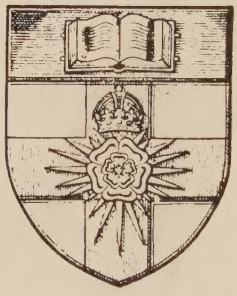
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

346.4 Mx North.



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/irish-reports_1907_1

THE IRISH REPORTS.

1907—Vol. 1.

IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS,

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

1907.

VOL. I.

CHANCERY DIVISION AND LAND COMMISSION.

DUBLIN:

PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,

BY EDWARD PONSONBY,

116, GRAFTON STREET.

1907.

BIBL. LONDIN. UNIV.

DUBLIN:

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

At the University Press,

BY PONSONBY AND GIBBS.

Lord Chancellor.

The Right Hon. Sir Samuel Walker, Bart.

Lords Justices of Appeal.

The Right Hon. Gerald FitzGibbon.
The Right Hon. Hugh Holmes.

Chancery Division.

The Right Hon. R. E. Meredith, M.R.
The Hon. Dunbar Plunket Barton.

Land Judge.

The Right Hon. John Ross.

Irish Land Commission: Judicial Commissioners.

The Hon. J. O. Wylie.
The Hon. Gerald FitzGerald.

Attorney-General.

The Right Hon. Richard R. Cherry.

Solicitor-General.

Redmond J. Barry, K.C.

[These Reports will be cited as follows :—[1907] 1 I. R.]

REPORTERS.

Court of Appeal, . .	ROBERT D. MURRAY, R. ST. J. CHADWICK,	Barristers-at-law.
Master of the Rolls, .	WILLIAM LAWSON, R. W. LUCAS,	Barristers-at-law.
Mr. Justice Barton, .	JOHN MACMAHON, WILLIAM M'GRATH,	Barristers-at-law.
Land Judge, ...	D. M. STEEN,	Barrister-at-law.
Land Commission, . .	JOHN EDWD. WALSH,	Barrister-at-law.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Alford, Falls *v.* (*In re* Black, deceased), 486
Allen, Hunter *v.* 212
Allison *v.* Jenkins, 422, 434
Appleton, Attorney-General (O'Duffy) *v.* 252
Armstrong's Estate, *In re*, 361
Attorney-General (O'Duffy) *v.* Appleton, 252
——————— (———) *v.* Myddletons, Limited, 471

B.

Balrothery Rural District Council, O'Callaghan *v.* 494, 503
Bandon's (Earl of) Estate, *In re*, 226
Beauclerk's Estate, *In re*; Scottish Widows' Fund Life Assurance Society, Petrs., 76
Black, deceased, *In re*; Falls *v.* Alford, 486
Blackall, Butler *v.* 405
Boland's Estate, *In re*, 21
Bowman *v.* Hill, 451
Bradshaw *v.* Bray Urban District Council, 152
Butler *v.* Blackall, 405
———, O'Connor *v.* (*In re* Delahunty, deceased), 507, 510
Butlin's Estate, *In re*, 159

C.

PAGE

Carroll, Hanly *v.* 166, 176
Carroll's Estate, *In re*, 148
Caulfield, Petitioner; *In re* Wallace's Estate, 91
Chaytor, Gibbon *v.* (*In re* Gyles, deceased), 65
Coleman's Estate, *In re*; Henry, Petitioner, 488
Collum, Poirez *v.* 5, 7
Coote, Sweeney *v.* 233
Coyle, Pim *v.* 330, 334
Crean, Tenant; Crosbie, Vendor, 116, 124
Crosbie, Vendor; Crean, Tenant, 116, 124
——————; Neilan, Tenant, 116, 124
Crowley, Russell *v.* 275, 282
Cullen's Estate, *In re*, 73

D.

Delahunty, deceased, *In re*; O'Connor *v.* Butler, 507, 510
Devaney, deceased, *In re*; M'Garry *v.* Kilcullen, 327
Doyle's Estate, *In re*, 204
Duke, M'Cormick *v.* 339
Dunne, deceased, *In re*; Lynch *v.* Dunne; Hume *v.* Dunne, 202

F.

PAGE
Fahey, Jameson *v.* 414, 421
Falls *v.* Alford (*In re* Black, deceased), 486
Ferris *v.* O'Kean (*In re* O'Kean, deceased), 223, 225
Finlay's Estate, *In re*, 24
Freeman, *In re*, 444

G.

Gibbon *v.* Chaytor (*In re* Gyles, deceased), 65
Glynn, Vandeleur *v.* 85, 88
——, —— *v.* 481
Greer, deceased, *In re*; Greer *v.* Greer, 57
Gyles, deceased, *In re*; Gibbon *v.* Chaytor, 65

H.

Hamilton and Royds, Landlords; M'Farland, Tenant, 41
Hanly *v.* Carroll, 166, 176
Harris, Lyons *v.* 32
Hatrick, Miller *v.* 82, 84
Hayes, Radcliff *v.* 101
Hayes' Settled Estate, *In re*, 88
Henderson, Munro *v.* 440
Henry, Petitioner; *In re* Coleman's Estate, 488
Hill, Bowman *v.* 451
Holmes' Estate, *In re*, 1, 139
Hume *v.* Dunne; *In re* Dunne, deceased, 202
Hunter *v.* Allen, 212

I.

Irish Mercantile Loan Society, *In re*, 98
Irwin's Estate, *In re*; Irwin, Petitioner, 357

J.

PAGE
Jameson *v.* Fahey, 411, 421
Jenkins, Allison *v.* 422, 434
Joly, Petitioner; *In re* Tyrrell's Estate, 194, 292

K.

Kennedy, Petitioner; *In re* Morrison's Estate, 15
Kenrick, *In re*, 480
Kilcullen, M'Garry *v.* (*In re* Devaney, deceased), 327
Kinahan's Trusts, *In re*, 321

L.

Lane, *Ex parte*, 258
Laverty *v.* Laverty, 9
Long *v.* Moore (*In re* Moore, deceased), 315
Lynch *v.* Dunne; *In re* Dunne, deceased, 202
Lyons *v.* Harris, 32

M.

M'Clintock, Landlord; Moore, Tenant, 180
M'Cormick *v.* Duke, 339
M'Farland, Tenant; Hamilton and Royds, Landlords, 41
M'Garry *v.* Kilcullen (*In re* Devaney, deceased), 327
M'Munn, Petitioner; *In re* Stinson's Estate, 49
Madden's Estate, *In re*, 351, 354
Maguire and M'Clelland's Contract, *In re*, 393
Massereene, Landlord; Vance, Tenant, 363
Miller *v.* Hatrick, 82, 84
Moore, deceased, *In re*; Long *v.* Moore, 315
Moore, Tenant; M'Clintock, Landlord, 180

PAGE

Morrison's Estate, *In re*; Kennedy, Petitioner, 15
Munro *v.* Henderson, 440
Munster and Leinster Bank, *In re*, 237
Myddletons, Limited, Attorney-Gen. (O'Duffy) *v.* 471

N.

Neilan, Tenant; Crosbie, Vendor, 116, 124
Nugent's (Assignees of) Estate, *In re*, 198

O.

O'Callaghan *v.* Balrothery District Council, 494, 503
O'Connell, Petitioner; *In re* Thomson's Estate, 190, 311
O'Connor *v.* Butler (*In re* Delahunty, deceased), 507, 510
O'Kean, deceased, *In re*; Ferris *v.* O'Kean, 223, 225

P.

Pavitt, *In re*, 234
Pim *v.* Coyle, 330, 334
Poirez *v.* Collum, 5, 7
Power's Estate, *In re*, 51
Purvis, *In re*, 447

R.

PAGE

Radcliff *v.* Hayes, 101
Roberts' Estate, *In re*, 483
Rowe's Estate, *In re*, 380, 388
Russell *v.* Crowley, 275, 282

S.

Scottish Widows' Fund Life Assurance Society, Petitioners; *In re* Beauclerk's Estate, 76
Stinson's Estate, *In re*; M'Munn, Petitioner, 49
Sweeney *v.* Coote, 233

T.

Thomson's Estate, *In re*; O'Connell, Petitioner, 190, 311
Tuthill, *In re*, 305
Tyrrell's Estate, *In re*; Joly, Petitioner, 194, 292

V.

Vance, Tenant; Massereene, Landlord, 363
Vandeleur *v.* Glynn, 85, 88
——— *v.* ———, 481

W.

Wallace's Estate, *In re*; Caulfield, Petitioner, 91
Wynne, *In re*, 305

TABLE OF CASES CITED.

A.

PAGE

Abbott *v.* Middleton, . . 442
Adams *v.* Angell, ... 94
Adams and the Kensington Vestry, *In re*, . . 503, 510
Addison *v.* Cox, ... 323
Agra Bank *v.* Barry, . . 59, 64
Ailesbury's (Marquis of) Settled Estates, *In re*, . . . 306
Alcock *v.* Sloper, . . . 35
Alexander *v.* Mills, . . . 398
Allen *v.* Knight, . . . 60, 61
Alliance Marine Insurance Co., *In re*, ... 246
Anderson *v.* Anderson, . . 319
Annaly's (Lady) Estate, *In re*, 52, 53, 54
Archer *v.* Caledon, . . 182, 186
Armstrong's Estate, *In re*, . 205
Atkinson *v.* Lord, . . . 282
Attorney-General (O'Duffy) *v.* Appleton, . . . 475, 476
——— *v.* Ashborne Recreation Ground Co., . . . 255
——— *v.* Cashel (Corporation of), ... 12
——— *v.* Cummins, . 197, 299
——— *v.* Lonsdale, . . 11, 12
——— *v.* Pearce, . . 12
——— *v.* Sidney Sussex College, ... 11, 12
——— *v.* Wimbledon House Estate Co., ... 255

B.

Bagot's Settlement, *In re*, 308, 309
Bainbrigge *v.* Blair, . . 199
Baldwin *v.* Bridges, . . 274
Barrett *v.* Burke, . 268, 269, 270
Barry *v.* Spaight, 86, 426, 428, 434, 436
Battersby's Estate, *In re*, . 78
Bayley *v.* Conyngham, . . 102
Belton's Estate, *In re*, . . 17
Bentley's Estate, *In re*, . . 79
Bernard *v.* Drought, . . 58, 61
Bernicia S.S., Limited, . 245, 249
Bethune *v.* Kennedy, . . 34
Bevan *v.* Webb, . . . 216
Biscoe *v.* Perkins, . . . 170
Biss, *In re*, 215, 216, 218, 220, 221
Blackburn, *In re*, . . . 319
Blundell *v.* Blundell, . . 224
Bond *v.* Dickenson, . . . 510
——— *v.* Slator, . . . 268
Booth *v.* Alington, . . . 408
Booth's Settlement Trusts, *In re*, ... 324
Bowen, *In re*, ... 195
Boylan *v.* Warner, . . . 269
Braund *v.* Devon . . . 12
Brennan *v.* Dorney, . . 216
Bridge *v.* Beadon, . . 322, 324
Bristow *v.* Whitmore, . 458, 463
Brocke *v.* Bank, . . . 343
Brockleby *v.* Temperance Building Society, . . . 343
Browne *v.* King, . . . 12
——— *v.* Warner, . . . 491
Burchell *v.* Coyle, . . . 121
——— *v.* Crawford, . . 121
Burke's Estate, *In re*, . . 58
Burnside *v.* Burnside, . . 398
Burrell *v.* Egremont, . . 94
Butler *v.* Portarlington, 268, 269, 270, 271
Buswell's Estate, *In re*, . . 77, 79
Byrne *v.* Blackburn, . . 510

C.

PAGE

Capel *v.* Butler, . . . 199
Carroll's Estate, *In re*, . 3, 4, 56
Carter *v.* Carter, . . . 61
Casamajor *v.* Strode, . . 382
Champion, *In re*, . . . 319
Chatterton *v.* White, . . 421
Christ's Hospital *v.* Grainger, 195
Christy *v.* Gordon, . . 182, 373
Churchill *v.* Denny, . . 52, 55
City Provident Society, *In re*, . 100
Claire's Estate, *In re*, . . 77
Clarke *v.* Palmer, . . . 58, 61
Cleary's Estate, . . . 358
Cleary's Trusts, *Re*, . . 74
Clements *v.* Casey, . . 102, 110
Colclough's Estate, *In re*, 17, 18, 19, 20, 78
Collins *v.* Collins, . . 34, 35, 36, 37
Colce's Estate, *In re*, . . 79
Colyer *v.* Finch, . . . 60
Commissioners of Charitable Donations and Bequests *v.* Wybrants, . . . 170, 174
Commissioners of Income Tax *v.* Pemsel, . . . 10, 11, 12
Connolly's Estate, *In re*, . 28
Corcor *v.* Payne, . . 102
Crone *v.* Odell, . . . 441
Cronin *v.* Dennehy, . 358, 360
Crosbie's Estate, *In re*, ([1906] 1 I. R. 515), . . 124, 129
Cruddes *v.* Smith, . . . 408
Cullen *v.* Leonard, . . . 268
Cullimore's Trusts, *In re*, . 11, 12
Cunningham *v.* Foot, . 170, 179

D

Dallas, *In re*, . . . 322, 324
Daly *v.* Wright, 182, 363, 366, 368, 370, 377
Daniell's Settled Estates, *In re*, 308, 309
Darke *v.* Williamson, 457, 462, 463
Davies *v.* Fowler, . . . 70
Davis *v.* Marlborough (Duke of), 199
Deane *v.* Waterford (Marquis of), 274
Dearle *v.* Hall, . . . 325
Dempsey *v.* Ward, . 215, 216, 221
Denny *v.* Wright, . . . 7
De Pereda *v.* De Mancha, . 235
De Quetteville *v.* De Quetteville, 70
Dixon *v.* Rowan, . . 162, 163
Doe *v.* Collier, . . . 170
—— d. Biddulph *v.* Hole, 318, 319
Domvile's Estate, *In re*, 3, 141, 142, 143, 146

PAGE

Donovan *v.* Needham, . . 70
Dower *v.* Dower, . . 171, 176
Du Cane and Nettlefold's Contract, ... 89, 90, 484
Dudden *v.* Clutton Union (Guardians of), . . . 497
Duffy *v.* Duffy, . . . 398
Dyott *v.* Massereene and Ferrard, ... 268, 269
——— *v.* Reade, . 86, 426, 428

E.

Earle *v.* Bellingham (No. 2), 69, 70, 72
Egan *v.* Stack, . . . 215
Ely's Estate, *In re*, 52, 53, 54, 79, 231, 307, 308
Emery *v.* Grocock, . . . 399
Etty *v.* Bridges, . . . 322
Evans *v.* Bicknell, . . . 60
Eyre *v.* M'Dowell, 332, 336, 337, 338

F.

Farquharson Brothers & Co. *v.* King & Co., ... 63
Farrand *v.* Yorkshire Banking Co., ... 63
Farrer, *In re*, . . . 319
Farrow *v.* Rees, . . . 60
Featherstonhaugh *v.* Fenwick, . 216
Fitzgerald *v.* Fairbank, . 102, 113
Fitzsimons *v.* Burton, . . 269
Forbes *v.* Jackson, . . . 199
——— *v.* Moffatt, . . . 161
Foreign and Colonial Trust Co., *In re*, ... 246
Foster's Estate, *In re*, . . 28
Fox *v.* Martin, . . . 342
Fraser, *In re*, . . 317, 319
French *v.* Hamilton, . . 510

G.

Galbraith *v.* Cooper, . . 269
Game, *In re*, ... 37
Gandy *v.* Macaulay, . . 283
German *v.* Chapman, . . 11
Gilbertson *v.* Richards, . 173, 177
Gillman's Estate, *In re*, . . 28
Givan *v.* Moffitt, . . . 182
Gloster *v.* Ryan, . . . 44
Godley's Estate, *In re*, 161, 352, 356
Goodman *v.* Saltash (Mayor of), 12
Goodtitle *v.* Morgan, . . 60
Governments Stock Investment Co., *In re*, . . . 246, 249

PAGE

Governments Stock Investment Co. *In re* (No. 2), . 246, 249
Grace, *Ex parte*, . . 215, 216
Graham *v.* Chambers, 396, 397, 398
——— *v.* Ewart, . . 102, 112
Grant *v.* Gunner, . . . 415
Griffith *v.* Owen, . . 215, 216
Grissell *v.* Money, . . . 458
Grogan's Estate, *In re*, 3, 141, 143, 147

H.

Haly's Trusts, *In re*, 508, 509, 510
Hanbury *v.* Jenkins, . . 102
Harding's Estate, *In re*, . . 308
Harlock *v.* Ashberry, . . 359
Hatton *v.* Waddy, . . . 382
Heap *v.* Hartley, . . . 102
Hennan & Co., Limited, *v.* Duckworth, ... 476
Hibblewhite *v.* M'Morine, . 342
Hobbs, *In re*, . . . 398, 401
Hodge *v.* Churchward, . . 179
Hodson and Howes' Contract, *In re*, . . . 448
Holford *v.* Bailey, . . 102, 114
——— *v.* Pritchard, . . 102
Holmes *v.* Day, . . 490, 492
Holmes' Estate, . . . 150
Home *v.* Pillans, . . . 442
Hope *v.* Hope, . . . 235
Hopwood *v.* Hopwood, 317, 318, 319
Howe *v.* Dartmouth, 32, 34, 35, 36, 37, 38, 40
Howlin's Estate, *In re*, . 141
Hughes *v.* Coles, . . 171, 176
Hunt *v.* Bateman, . 170, 174, 179

I.

Iever's Settlements, *In re*, 305, 306, 308, 309
Independent Loan Fund Society, *In re*, ... 99

J

Jackson *v.* Saunders, 268, 269, 270
John *v.* Armstrong, 268, 269, 271
Johnstone *v.* Cox, . 322, 323, 324
Jones *v.* Morgan, . . . 94
——— *v.* Williams, . . . 103
Jordan *v.* Lowe, . . . 74
Joynt *v.* MacCabe, . . . 86
——— *v.* Richards, . . . 28

K.

PAGE

Kearney *v.* Kearney, . 224, 225
Keating *v.* Sparrow, . . 269
Keck and Hart's Contract, *In re*, ... 89, 90
Kelch *v.* Gormanston, . . 77
Kelly *v.* Enright, . . . 205
Kennedy *v.* De Trafford, . 216, 221
Kennedy's Estate, *In re*, . 191, 312
Kensington *v.* Bouverie, . . 94
Kildare *v.* Fisher, . . 411, 420
Kilkelly *v.* Powell, . . . 162
Killeen *v.* Lambert, . 182, 366
King's Leasehold Estate, *In re*, ... 491, 493
Kingston's (Earl of) Estate, . 359
Kingstown Township Commissioners, *Ex parte*; *In re* Local Government Board, . 500
Knight *v.* Ellis, . . . 74, 75
Kusel *v.* Watson, . . . 491

L.

Lambe *v.* Eames, . . . 512
La Société Anonyme des Anciens Etablissements Panhard *v.* Panhard Levasseur Motor Co., 255
Leigh *v.* Leigh, . . . 510
Leonard's Estate, *In re*, . . 229
Leventhorpe *v.* Ashbie, . . 73
Lifford *v.* Quin, . . . 421
Lloyd *v.* Banks, . . . 322
Lloyd's Banking Co. *v.* Jones, 58, 62, 343
Lofthouse, *In re*, . . 235, 236
London and South-Western Railway Co. *v.* Gomm, 195, 206, 208, 211, 296, 297, 298, 299, 301, 303, 304
London Society (Lessee of) *v.* Trustees of Gwynn's Charities, ... 86
Long *v.* Long, . . . 269
Lonsdale *v.* Lowther, . . 484
Lord *v.* Lord, ... 71
Lord Advocate *v.* Blantyre, . 103
——— *v.* Young, . 103
Lowe *v.* Adams, . . . 103
Ludlam, *In re*; Ludlam *v.* Ludlam, . . . 69, 70, 72

M.

M'Alinden *v.* M'Alinden, . 510
M'Cann *v.* Downshire, . . 182
MacDonald *v.* Irvine, . 34, 35, 37
M'Iver, *In re*, . . . 427

PAGE
Mackay *v.* Gould, . . 280, 282
Mackesy *v.* Mackesy, . . 162
Mackett *v.* Mackett, 509, 510, 511
Macnamara *v.* Macnamara, 182, 363, 366, 368, 370, 372, 376
M'Naul's Estate, *In re*, . . 491
Maconchy *v.* Bank of New Zealand, . . 86, 426, 428
Maher *v.* Maher, . . . 441
Manners *v.* Mew, . . . 62
Mardell *v.* Curtis, . . . 491
Martinez *v.* Cooper, . . . 60
May *v.* Belleville, . . 102, 109
Meade's Estate, *In re*, . . 205
Meade's Settled Estates, *In re*, 89, 90
Merritt *v.* Boswell, . . . 358
Minhear's Estate, *In re*, . 141, 229
Minnett *v.* Lord Talbot de Malahide, 457, 458, 461, 463, 464, 465, 470
Morgan *v.* Morgan, . . 34, 38
Morley *v.* Morley, . . . 94
Morrall *v.* Sutton, . . . 441
Morrison's Estate, *In re*, 78, 79, 80
Mostyn *v.* Atherton, . . 497
Mountcashell *v.* Smyth, . 318, 320
Mountnorris (Lord) *v.* White, 268, 269, 270
Mulchinock's Estate, *In re*, . 312
Mullings *v.* Trinder, . . 399

N.

National Boiler Insurance Co., *In re*, ... 246
National Provincial Bank of England *v.* Jackson, . . 63
Newen, *In re*, . . 308, 309
Newton *v.* Chorlton, . . 199
New York Exchange, Limited, *In re*, ... 99, 100
Nixon's Estate, *In re*, 17, 18, 19, 20, 78
Northern Counties Fire Insurance Co. *v.* Whipp, . . 61

O.

O'Donovan *v.* Kenmare, . . 69
O'Duffy *v.* Jaffe, 255, 257, 258, 475, 476, 478, 479
Oliver *v.* Hinton, . . . 58, 62
Owens' Estate, *In re*, . 191, 312

P.

PAGE
Page *v.* Leapingwell, . . 408
Palmer *v.* Young, . . . 216
Pearks *v.* Moseley, . . . 295
Perry, Nerrick *v.* Atwood, . 343
Peyton, *Ex parte*, . . . 268
Pharmaceutical Society *v.* London and Provincial Supply Association, . . . 476
Pickering *v.* Pickering, 34, 35, 36, 37, 38, 39
Pilcher *v.* Rawlins, . . 61
Pledge *v.* Buss, . . . 199
Powell *v.* London and Provincial Bank, ... 342
Powys *v.* Mansfield, . 317, 319
Pyrke *v.* Waddingham, . . 399

R.

R. *v.* Bayley, ... 199
— *v.* Darlington Local Board, 497, 499
— *v.* Fay, ... 199
— (Rowell) *v.* Registrar of Joint Stock Companies, 255, 475, 476
— *v.* Ridgewell (Inhabitants), . 343
— (O'Brien) *v.* Tipperary (Chairman and Justices of), 221
Rawlins *v.* M'Mahon, . . 409
Rayer, *In re*, . . . 317, 319
Redington *v.* Browne, . . 195
Redington's Estate, *In re*, . 77
Reynolds *v.* Moore, . . . 102
Richards *v.* Gledstanes, . . 322
Robb *v.* Connor, . . . 426
Roberts *v.* Gwyrfai District Council, 494, 497, 498, 499, 500, 503, 505
——— *v.* Tregaskis, . . 492
Robertson *v.* Hartop, . . 416
Roche's Estate, *In re*, . . 58
Rooney *v.* Langtry, 427, 436, 437
Rorke *v.* Errington, . . 383

S.

Saffron Walding Building Society *v.* Raynor, . . 322
Scanlan's Estate, *In re*, . . 17
Seager *v.* Aston, . . . 359
Sealy *v.* Stawell, . . . 70
Sheehy *v.* Bradshaw, . . 269
Shelley's Case, . . . 75
Shenton *v.* Corbally, . . 269
Sherlock's Estate, *In re*, . 205, 207
Singleton's Estate, *In re*, . 484
Sitwell *v.* Bernard, . . . 69
Smith *v.* Buller, . . . 86
——— *v.* Kemp, . . . 114

PAGE
Smith *v.* Shannon, . . . 271
Smith's (A. L.) Estate, *In re*, . 28, 79
Soar *v.* Ashwell, . . . 217
Staley *v.* Barrett, . . 359, 361
Stamer *v.* Evans, . . . 224
Stamford's Estate, *In re*, 307, 308
Staniforth *v.* Staniforth, . . 70
Stephens *v.* Green, . . 322, 324
Stilwell *v.* Mellersh, . . 317
Stinson's Estate, *In re*, . . 17
Stokes *v.* Bridgman, . . 409
Swan *v.* North British Australasian Co., . . . 342, 343
Swan's Estate, *In re*, . . 199
Swanton's Estate, *In re*, . . 17, 78
Swinfin *v.* Swinfin, . . . 163
Switzer *v.* Rochford, 197, 206, 208, 297, 303, 304
Sykes *v.* Langrishe, . . 428

T.

Talbot Crosbie's Estate, . 206, 208
Tatham *v.* Drummond, . 70, 71
Taylor *v.* London & County Banking Co., . . . 63
——— *v.* Martindale, . . 28
——— *v.* Russell, . . . 62
Thomas *v.* Thomas, . . 397
Thompson *v.* Bolton, . . 427
Thomson *v.* Eastwood, . . 170
Tibbitts' Settled Estates, *In re*, 90
Tinker *v.* Rodwell, . 396, 397
Tottenham's Estate, *In re*, . 353
Townley *v.* Bond, . . . 268
Trant *v.* Dwyer, . . . 274
Truro (Lady), In the Goods of, 319
Tulk *v.* Moxhay, . . . 304

U.

Ulrich *v.* Litchfield, . . 441
Ulster Marine Insurance Co., 246, 250

V.

PAGE
Vickery *v.* Deane, . . . 120

W.

Wall *v.* Stanwick, . . 398, 400
Walsh *v.* Lonsdale, . . . 102
Walton *v.* Lee, . . . 102
Ward *v.* Duncombe, . 322, 325
Waters, *In re*, . . . 70
Watkins *v.* Lloyd, . . 269, 271
Webb *v.* Kelly, . . . 487
Whicker *v.* Hume, . . . 12
Wickham *v.* Hawker, . 103, 113
Willoughby, *In re*, . 235, 236
Wilkes *v.* Collin, . . . 162
Wilkes' Charity, *In re*, . . 12
Wills-Sandford's Estate, *In re*, 124, 129
Wilson *v.* Bell, . . . 510
——— *v.* Kenrick, . . . 408
Wise *v.* Perpetual Trustee Co., 458, 462, 463
Wood *v.* Davis, . . . 491
—— *v.* Knox, . . . 269
—— *v.* Leadbitter, . . 102
—— *v.* Penoyre, . . . 69
Wood's Estate, *In re*, . . 358
Woodall *v.* Clifton, . 195, 297
Worthing Corporation *v.* Heather, . . 195, 196, 297
Wrexham (Mayor of) *v.* Tamplin, ... 12
Wynch, *Ex parte*, . . . 74, 75
Wythes, *Re*, ... 308

Z.

Zimbler *v.* Abrahams, . . 491

CORRIGENDUM.

Page 392, line 4 from foot, *for* "compromise" *read* "confusion."

NOTE.

THE COURT OF APPEAL have affirmed the decision of BARTON, J., in *Munro* v. *Henderson* ([1907] 1 I. R. 440); and have reversed the decision of WYLIE, J., in *In re Roberts' Estate* ([1907] 1 I. R. 483).

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1907.

IN THE MATTER OF THE ESTATE OF GARNER EDMOND HOLMES (1).

Ross, J.
1906.
Nov. 21.

Land Purchase Acts—Insolvent estate—Owner of estate being also owner of a charge—Percentage under Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48.

Where an estate, in respect of which an absolute order for sale by the Land Judge was in force at the date of the passing of the Land Act, 1903, was so circumstanced that, on a sale, the owner would not, *quâ* owner, receive any residue after payment of incumbrances, but, *quâ* incumbrancer, was interested to the extent of a first charge for £1330:—

Held, that the estate was not (within the meaning of s. 48 (4) of the Land Act, 1903) an estate "so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price," and that the percentage mentioned in sect. 48 was payable.

ALLOCATION.

By his will, dated 13th March, 1845, Garner Joseph Holmes charged the lands of Lisduff with a charge of £2500 in favour of

(1) Before Ross, J., sitting as a Judicial Commissioner.

Ross, J. 1906. *In re* Holmes' Estate.

Matilda Holmes, now Balston, and a charge of £1330 in favour of Garner Edmond Holmes, the present vendor, and subject to these charges devised the lands to his son William Anthony Holmes absolutely. William Anthony Holmes by his will devised the lands to his wife Sophia Holmes for life, with remainder to Garner Edmond Holmes. Sophia Holmes died in 1886, but, owing to the existence of tail incumbrancers, the charge of £1330 did not merge. On 28th July, 1885, a petition was presented in the Land Judge's Court by Garner Edmond Holmes for arrears of his charge of £1330, and a receiver was appointed and an absolute order for the sale of the lands of Lisduff was made on the petition, which order was in force at the date of the passing of the Land Act, 1903. Upon the death of Sophia Holmes the receiver was discharged, and Garner Edmond Holmes entered into possession of the lands and continued in possession of them down to the date of the present proceedings, the rents and profits being divided between Garner Edmond Holmes and Matilda Eliza Balston in proportion to their respective charges of £1330 and £2500. On 22nd March, 1904, the Land Judge dismissed the petition out of Court, and the present vendor, Garner Edmond Holmes, proceeded to sell the lands to the occupying tenants under the Land Act of 1903. By an indenture, dated 8th August, 1904, made between Garner Edmond Holmes, as owner in fee-simple, and Matilda Eliza Balston, it was agreed that, upon the sale of the lands under the Act of 1903, the net purchase-money, after deduction of superior interests, should be divided between them in proportion to their respective charges of £1330 and £2500, and that the bonus should be divided between them in equal moieties.

The purchase-money of the estate advanced by the Land Commission amounted to £3084. After payment of all charges upon the schedule, it appeared that there would be no residue for the owner in fee. The rents and profits of the estate had for many years been insufficient to pay the interest on the charges. The vendor now applied for an order for payment of the percentage on the purchase-money under section 48 of the Land Act of 1903, amounting to £370.

Charles A. O'Connor, K.C., and *Redmond Carroll*, for the vendor :—

It is admitted that there was an absolute order for the sale of this estate in force at the date of the passing of the Act of 1903. The only question is whether the estate is so circumstanced that it would be sold without the consent of the owner as to price. If the owner has such an interest as would give him a voice in case of a sale, sub-sect. 4 of sect. 48 of the Act of 1903 does not apply. The only persons intended to be excluded by sub-sect. 4 were those who had no interest in the estate. The owner here had vested in him a charge prior to the tail incumbrancers. Even if the deed of 1904 had not been executed, the owner would still have an interest on a sale: *In re Grogan's Estate* (1); *In re Domvile's Estate* (2).

[Ross, J., referred to *In re Carroll's Estate* (3).]

The Solicitor-General (*Redmond Barry, K.C.*) and *Dudley White*, for the Treasury :—

The interest which the owner here has is not an interest of an owner but of an incumbrancer. The owner of an incumbrance is distinct from the owner of the residue. Where there is no real interest vested in the owner, he is not entitled to get the bonus. In *Grogan's Estate* (1), at p. 616, it was held by Ross, J., that according to the practice of the Landed Estates Court an estate would only be sold without the consent of the owner as to price in cases where the equity of redemption was valueless. That was a decision that, where the owner had no interest *quâ* owner, the estate was so circumstanced that it would be sold without the consent of the owner as to price.

O'Connor, K.C. :—

I admit that if these charges were vested in a stranger, the bonus would not be payable.

(1) [1896] 1 I. R. 614. (2) I. R. 11 Eq. 1. (3) [1906] 1 I. R. 661.

Ross, J.
1906.

In re HOLMES' ESTATE.

Ross, J.:—

I have in a late case (*Carroll's Estate*) (1) explained my views on section 48 of the Land Act of 1903. We must have regard to the object of the section. It was enacted for the purpose of inducing owners to sell to their tenants, and in return for selling they were to receive this percentage. That is the general rule, and exceptions to that general rule must be very clearly established. In this case there was, at the date of the passing of the Act of 1903, an absolute order in full force as to this estate; and the only question that remains for me to consider is, Was the estate "so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price"? There is no doubt that in his capacity as owner it would have been sold in the Land Judge's Court without consulting him at all. But the Act does not say that if he has no interest as owner, no percentage is to be paid; it leaves the word "owner" unqualified, and therefore we have to consider whether the owner would be consulted, having regard to all the interests that are vested in him, in any capacity.

I have no doubt whatsoever that, according to the ordinary practice of the Land Judge's Court, in the case of an owner having also a large interest as incumbrancer in him, he certainly would be consulted as to the price. That being so, the Treasury have failed to bring the present case within the words of the exception, and, therefore, the percentage must be paid.

Solicitors for the vendor: *Meldon & Company.*
Solicitor for the Treasury: *W. M. Lane.*

D. M. S.

(1) [1906] 1 I. R. 661.

POIREZ *v.* COLLUM.

Ross, J.
1906.
Nov. 16.
Appeal.
Dec. 14.

Ecclesiastical lease—Immediate and sub-perpetuity grant—Reddendum—Right of sub-grantee to vary rent—Church Temporalities Acts (3 & 4 *Wm.* 4, *c.* 37; 6 & 7 *Wm.* 4, *c.* 99).

In 1848 the plaintiff's predecessor in title, an ecclesiastical lessee with customary right of renewal, who had obtained a grant in perpetuity under the Church Temporalities Acts, and who was tenant for life under a settlement, joined with his trustees in making a sub-grant in perpetuity under the same Acts to the defendant's predecessor in title in respect of a sub-lease, dated 1788, which contained a *toties quoties* covenant for renewal on payment of a renewal fine of one shilling, if demanded. The sub-grant was made in consideration of the contribution by the grantee of the proportionate part of the purchase-money paid by the grantor to his head landlord in respect of his (the grantor's) grant in perpetuity, and without any increase of the rent reserved in the sub-lease of 1788.

The reddendum in the sub-grant was of the yearly rent of £ , "or such increased or diminished yearly rent or sum as shall or may from time to time, or at any time hereafter, be substituted in place or stead of the said reserved rent, pursuant to the provisions for that purpose contained in the said recited Act." No Act was, as a matter of fact, by regnal year, recited in the sub-grant:

Held, by the Court of Appeal (reversing the decision of Ross, J.), that the defendant's rent was not variable.

REFERENCE by the Receiver-Examiner for directions. The receiver's application was for liberty to allow £18 6*s.* 6*d.* to Captain Collum, the tenant of the lands of Drumcoo or Belview, on the ground that he was entitled to have the rent varied in manner provided by sect. 90 of the Irish Land Act, 1903. On behalf of the plaintiff, the allowance was objected to on the ground that the rent was not a variable one under the Church Temporalities Acts.

The rent was reserved by a sub-perpetuity grant, under the provisions of the Church Temporalities Acts, dated 5th June, 1848. The grantors in the sub-grant were Robert Archdall and Catherine Archdall, tenants for life under a settlement, and their trustees, Andrew Jones Crawford and Henry Mervyn Richardson; the grantee was John Collum.

Ross, J.
1906.
POIREZ
v.
COLLUM.

Robert Archdall held under a perpetuity grant executed in respect of a superior lease demised immediately from the fee, and the sub-perpetuity grant was executed in respect of an inferior lease, dated 1788, containing a *toties quoties* covenant for renewal on payment of a renewal fine of 1*s.*, if demanded. The estate of Robert Archdall became vested in the plaintiff. The estate of John Collum became vested in the defendant. The recital as to the application for the sub-perpetuity grant by John Collum recited that the contribution of £61 13*s.* 7*d.* paid by Collum was only the proportionate part of the purchase-money of £560 paid by Robert Archdall to the Earl of Belmore in respect of his perpetuity grant. The grant to Collum was in consideration of the contribution to the purchase-money alone, and without any increase of the rent reserved by the lease of 1788. The reddendum in Collum's grant was as follows:—"Yielding and paying therefor and thereout, yearly and every year, unto the said . . . and their heirs and assigns for ever the yearly rent or sum of £92 6*s.* 2*d.*, sterling, or such increased or diminished yearly rent or sum as shall or may from time to time, or at any time hereafter, be substituted in place or stead of the said reserved rent, pursuant to the provisions for that purpose contained in the said recited Act, the said reserved yearly rent, or such increased or diminished yearly rent to be so substituted in place or stead thereof, to be paid and payable by four quarterly payments in every year." No Act was, as a matter of fact, recited in the grant to Collum.

W. M. Jellett, K.C., for the plaintiff:—

The rent is not variable. The Act 3 & 4 Wm. 4, c. 37, gives the right of variation to the immediate tenant, and the Act 6 & 7 Wm. 4, c. 99, gives the right to inferior tenants. As the grant in defendant's deed is to an inferior tenant, the Act referred to in the deed but not recited must be the Act 6 & 7 Wm. 4. Under sect. 5 of 6 & 7 Wm. 4, c. 99, the only class of case in which the rent payable by a sub-grantee is variable is in a case where the rent reserved by the grant is made up *inter alia* of a proportion of the fine payable by the immediate tenant; but as in this case the fine was an ascertained sum, and as the rent reserved in the sub-

Ross, J.
1906.
POIREZ
v.
COLLUM.

grant does not comprise anything in respect of the proportion of fine payable by the immediate tenant, sect. 5 of the Act Wm. 4 does not apply: *Denny* v. *Wright* (1).

D. S. Henry, K.C., for the defendant:—

Under the words of the sub-grant there was a contract between the parties that the provisions of the Act of Parliament as to variation should be applied to this particular case.

Ross, J.:—

This case must be decided on the meaning of the contract made in the sub-grant of 5th June, 1848. The reddendum in that deed is as follows:—[His Lordship read it]. I take these words as referring not to sect. 5 of the Act 6 & 7 Wm. 4, but to the previous Act, 3 & 4 Wm. 4, which gave the right of variation to the head tenant. The rent is thus a variable rent on the face of the deed. The head rent could be varied, and this is a contract providing for a variation in that contingency in the rent of the sub-grantee.

D. M. S.

Appeal.
Dec. 14.

A mortgagee appealed (2).

H. D. Conner, K.C., for the appellant.

D. S. Henry, K.C., for the respondent.

SIR SAMUEL WALKER, C.:—

We have considered this matter fully, and we are all of opinion that the order of Ross, J., cannot be sustained, and that there was no power to treat the rent in question as a variable one. Mr. Henry has contended that this was a matter of contract, though not within the provisions of the statute, and he admitted that, if he failed in that, the law was against him. The lease of 1788

(1) [1906] 2 I. R. 465.

(2) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1906.

POIREZ v. COLLUM.

Sir Samuel Walker, C.

that is recited reserved an annual rent of £100 Irish, and provided that there should be a renewal of that lease from time to time, upon payment of a renewal fine of 1*s.*, if demanded. Those were the terms of the lease, and we must take them as being incorporated into the perpetuity grant of 1848. That grant contains a recital that it was made in pursuance of the statute, which must mean the Act 6 & 7 Wm. 4, c. 99. It is only by statutory power that tenants for life could make a grant in perpetuity. Then, when we come to the other recitals in the grant, it is stated that "the said John Collum has called upon the said Andrew Jones Crawford and Henry Mervyn Richardson to execute to him a conveyance of a perpetual estate and interest in the premises, in pursuance of the provisions of the Acts of Parliament in that case made and provided." By the operative part of the deed, these two trustees, and Robert Archdall and Catherine Archdall, who were tenants for life, "according to their several and respective estates, rights, and interests, and in pursuance of the provisions of the statute in that case made and provided," granted the lands to John Collum. The grantors, being trustees and tenants for life, had no power to alter any of the terms of the contract in the lease, which they converted into a perpetuity grant. The grant which they made was in pursuance of the provisions of an Act of Parliament, and therefore they could not change a fixed into a variable rent.

In my opinion, the decision of Ross, J., cannot be sustained, and the appeal must be allowed.

FITZ GIBBON and HOLMES, L.JJ., concurred.

Solicitors for the plaintiff: *Barrington & Son.*
Solicitors for the appellant: *William Fry & Son.*
Solicitor for the defendant: *James Riordan.*

R. D. M.

LAVERTY *v.* LAVERTY.

(1906. No. 702.)

Barton, J.
1906.
Oct. 27.
Nov. 3, 7.

Will—Construction—Trust for support and education—Objects to have specified names—Perpetuity—Uncertainty—Charitable bequest.

A testator devised all his real and personal estate to trustees, upon trust "to pay towards the support and education in Ireland of any Roman Catholic boy or boys, man or men, of the surname of O'Laverty or Laverty, O'Lafferty or Lafferty, being between the ages of eleven years complete and twenty-three years complete, until such boy or man shall have obtained a trade or profession, such sums as said trustees may think proper." Absolute discretion was given to the trustees as to the selection of recipients and the discontinuance of any payment to them for their "support or education." They were also empowered to accumulate and invest the interest, the profits of which were to be applied "in the same manner as those of the original shares or funds, viz. for the support of boys or men of the above-mentioned surnames, under the circumstances before mentioned":—

Held, that the gift was not charitable, and therefore failed.

By his will, dated 27th October, 1892, The Right Rev. James O'Laverty, of Holywood, in the county of Down, devised and bequeathed all his real and personal estate to the Rev. Henry Laverty, the Rev. Francis Laverty, and the Rev. Michael Laverty, whom he nominated as his executors, upon trust to sell and invest the proceeds in specified securities, with power, should they so please, to retain existing securities: and the income testator directed his trustees to dispose of in the following terms:—"To pay out of the income thereof the sum of £100 for masses for the good of my soul, and to pay towards the support and education in Ireland, of any Roman Catholic boy or boys, man or men, of the surname of O'Laverty or Laverty, O'Lafferty or Lafferty, being between the ages of eleven years complete, and twenty-three years complete, until such boy or man shall have obtained a trade or profession, such sums as said trustees may think proper, and the said trustees are to have the selection of such boys or men, and may at any time cease to pay towards the support or education of

Barton, J. 1906. LAVERTY v. LAVERTY.

any such boy or man without being required to assign any reason for so doing, and may select another boy or man of that or those surnames as a recipient, or they may allow the interest or profits from said shares or funds to accumulate for the purchase of other shares or funds of a like nature, the profits from which are to be applied in the same manner as those of the original shares or funds, viz. for the support of boys or men of the above-mentioned surnames under the circumstances before mentioned."

The testator died on the 18th April, 1906, and probate was duly granted to the above-mentioned executors named in the will.

The present summons was taken out by Edward Laverty, one of the next-of-kin of the testator, to have the following question determined: Whether the aforesaid bequest in the will was valid as a charitable bequest, or was void as offending against the rule against perpetuities? The defendants were the executors of the will, and by direction of the Court notice was served on the Attorney-General.

S. L. Brown, K.C., and *Drumgoole*, for the plaintiff:—

The trust is clearly one which creates a perpetuity, as the trustees can only apply the income of the fund even for the payment of the sum left for masses. The gift is, therefore, *prima facie* void, and that being so, it can only be sustained as a charitable gift, the *onus* of proving which rests upon the defendants.

There are four classes of charitable gifts, viz.: trusts for the relief of poverty, for the advancement of education, for the advancement of religion, and for other purposes beneficial to the community: see the judgment of Lord Macnaghten in *The Commissioners of Income Tax* v. *Pemsel* (1). The present gift cannot be supported as a charitable gift on the ground that it is for the benefit of the public or some section of them; it is merely a gift of private benevolence confined to persons of the name of Laverty or O'Laverty. If this gift could be supported at all as a charitable gift, it must fall under the first two classes, viz.: relief of the poor, or advancement of education. But there is no intention in the present case to relieve poverty. The only word used

(1) [1891] A. C. 531.

which could indicate any such intention is the word "support," but the mere use of that word does not imply any such intention. The words "support and maintenance" have a well-established meaning in conveyancing, and are frequently used in making provision for the children of well-to-do parents: see the judgment of the Master of the Rolls in *Cullimore's Trusts* (1), at p. 25, in reference to the use of the word "maintenance." "Support" is an analogous word, and, therefore, does not *per se* import poverty. Nor can this gift be supported on the ground that it is for educational purposes. If money is devoted to the education of a limited class through the medium of some educational institution or something connected with it, in such a case the general purpose of the gift is the benefit of education itself and not merely the education of a restricted number of persons as here. The trustees may accumulate the income for ever, and not apply it for anyone's benefit; they have also an absolute power as to the selection of recipients. In fact, they have an unfettered discretion, and can, if they choose, adopt objects of the trust which are not charitable. Therefore, this bequest is void on that ground alone.

James Kerr, for the defendants:—

The main character of the gift is educational. Testator was a distinguished Irish scholar, and his manifest intention was the education and support of persons who were, so to speak, his clansmen. The name O'Laverty means "son of the noble house." Nothing in this gift is inconsistent with authorities in favour of charities. It is not a gift to persons or *personæ designatæ*. It is a gift for the education of a class of persons. Such gifts are undoubtedly "charitable." The class may be restricted in a variety of ways, *e.g.* to members of a particular religion: *The Commissioners of Income Tax* v. *Pemsel* (2); or to "the daughters of missionaries": *German* v. *Chapman* (3); or to "the sons of gentlemen": *Attorney-General* v. *Lonsdale* (4); or to the donor's "descendants and kinsmen": *Attorney-General* v. *Sidney Sussex College* (5); or to the lineal descendants of testator's

(1) 27 L. R. Ir. 18.
(2) [1891] A. C. 531.
(3) 7 Ch. D. 271.
(4) 1 Sim. 105.
(5) L. R. 4 Ch. 722.

Barton, J. 1906.

LAVERTY v. LAVERTY.

grandfather," as was decided in *Braund* v. *Devon* (1). An almost parallel case is that of *In re Wilkes' Charity* (2), where there was a gift to endow a fund "for the maintenance and education of a boy to be chosen out of certain parishes." *In re Cullimore's Trusts* (3) does not apply, as in that case there was no mention of the word "education." In the case of a gift for "education" the question of poverty does not arise.

Dudley White, for the Attorney-General, supported the contention that the gift was charitable. [He cited *Attorney-General* v. *Pearce* (4); *Whicker* v. *Hume* (5); *Braund* v. *Devon* (1); *Attorney-General* v. *Sidney Sussex College* (6); *Attorney-General* v. *Lonsdale* (7); *Commissioners of Income Tax* v. *Pemsel* (8); *Mayor of Wrexham* v. *Tamplin* (9); *Goodman* v. *Mayor of Saltash* (10); *Attorney-General* v. *Corporation of Cashel* (11).]

Drumgoole, in reply:—

The trustees have full power to give the income of the fund to any boy of the specified name irrespective of his means or, if they please, they may give it all to one. Such a power is wide enough to embrace objects not charitable, and the gift must, therefore, fail: *Browne* v. *King* (12). A bequest for the education of members of a particular family, unconnected with any intention to benefit education in general, is not a good charitable gift.

Nov. 7.

BARTON, J.:—

The question for decision is whether this bequest can be supported either (*a*) as a private bequest to a class of individuals, or (*b*) as a charity.

I think it is quite clear that this bequest cannot be regarded as a beneficial gift to an ascertainable class of individuals. The class could hardly be ascertained by an inquiry at Chambers

(1) L. R. 3 Ch. 800.
(2) 3 Mac N. & G. 440.
(3) 27 L. R. Ir. 18.
(4) 2 Atk. 87
(5) 7 H. L. Cas. 124.
(6) L. R. 4 Ch. 722.
(7) 1 Sim. 105.
(8) [1891] A. C. 531.
(9) 21 W. R. 768.
(10) 7 App. Cas. 633.
(11) 3 Dr. & War. 294.
(12) 17 L. R. Ir. 448.

without taking something in the nature of a census on a small scale. Besides, upon its true construction, the bequest would create a perpetuity, and is, therefore, void unless a charity.

Charities in their legal sense have been conveniently divided by Lord Macnaghten into four classes, viz.: trusts for the relief of poverty; for the advancement of education; for the advancement of religion; and for other purposes beneficial to the community. Does this bequest belong to any, and if so, to which, of these four classes? There is nothing in this bequest to limit its operation to the relief of poor or necessitous persons. It is not a trust for the advancement of religion. Its purposes can hardly be regarded as one of those general purposes beneficial to the community, or to some class of the community, which have been held charitable without any element of the relief of poverty, or advancement of religion or education. There remains the question whether the bequest constitutes a valid charitable trust for the advancement of education.

The origin of charitable educational trusts is to be found in some words in the preamble of the statute of Elizabeth, "the maintenance of schools of learning, free schools, and scholars in universities." In my opinion, a valid charitable trust might be created for the advancement of education, with a preference for persons of a particular surname, either by the endowment of, or gift to, a school or college, or by a gift, as in the present case, to trustees, if sufficiently definite. But is this bequest of that character? Having regard to the wide discretion given to the trustees, it seems that it might be worked, and might have been intended to work, as a mere matter of private bounty. For example, might not the trustees, acting within the wide power and discretion conferred upon them by the will, carry out the trust by employing a governess or tutor for some wealthy young Laverty? Such a purpose could not be regarded as charitable in the legal sense.

Another objection has been made, which is grounded on the word "support," which occurs three times in the bequest. In the first place, the bequest is for "support" and education. In that context support might be regarded as ancillary to education. Support and education go together in residential schools

Barton, J. 1906.

LAVERTY v. LAVERTY.

and colleges, where fees and scholarships may include support as incidental to education. But it is not so clear that the other references to "support" in the bequest were intended to be ancillary to education. The trustees are given a discretion to cease paying towards the support "*or*" education of any boy or man. Does this mean that the trustees might cease to pay for "education" while continuing to pay for "support"? Then we find that the concluding words of the bequest describe it as being for "the support of boys or men of the above-mentioned surnames under the circumstances before-mentioned." Here there is no mention of education save in so far as it is alluded to as one of "the circumstances before-mentioned." It has been contended on behalf of the next-of-kin that the trustees, acting within their power, might apply this bequest to the support of some wealthy young Laverty without seeing to his education. Here again the testator has left the trust so indefinite that it might be worked more on lines of private bounty than of public charity; and I have already pointed out that the gift cannot be supported as a private bequest.

Looking at the whole bequest, and especially at the wide and indefinite character of the discretion given to the trustees, I have come to the conclusion that this gift cannot be supported as a public charitable trust.

Solicitors for the plaintiff: *Russell & Son.*
Solicitor for the defendant: *Laverty.*
Solicitors for the Attorney-General: *Harris & Greene.*

J. MAC M.

Appeal.
1906.
Nov. 30.

IN THE MATTER OF THE ESTATE OF RICHARD F. MORRISON, OWNER; EVORY KENNEDY, PETITIONER; CONTINUED IN THE NAME OF RICHARD HOBART MORRISON, AS DEVISEE AND LEGATEE FOR LIFE UNDER THE WILL OF THE SAID RICHARD F. MORRISON, AS OWNER (1).

Landed Estates Court—Absolute order for sale—Incumbrances created by owner after order for sale—Statute of Limitations.

Where, subsequent to the date of an absolute order for sale, made on an incumbrancer's petition, the owner creates a valid incumbrance on the lands ordered to be sold, such incumbrance is protected by the absolute order for sale against the operation of the Statute of Limitations.

In re Colclough's Estate (8 Ir. Ch. R. 330) and *In re Nixon's Estate* (Ir. R. 9 Eq. 7) considered. *In re Swanton's Estate* ([1898] 1 Ir. R. 157) followed.

ON the 13th November, 1876, a petition for sale of the estate of Richard Fielding Morrison, comprising extensive house property in the city of Dublin, was filed in the Land Judge's Court by Evory Kennedy, an incumbrancer on the said estate. A conditional order for sale of the said estate was made on the 6th December, 1876, and the said order was made absolute on the 2nd March, 1877. An abstract of title to the property was lodged on the 11th December, 1877, and the Judge's rulings thereon were issued on the 15th December, but the sale of the estate was not carried out.

By an indenture of mortgage, dated the 23rd September, 1880, the said Richard Fielding Morrison conveyed the premises comprised in the absolute order for sale to James M'Donald and Michael M'Donald, for the term of 999 years, to secure the sum of £220 9*s.*, with interest thereon at 5 per cent. per annum. The said James M'Donald and Michael M'Donald carried on business in partnership, and the sum secured by the said mortgage was a

(1 Before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1906.

In re Morrison's Estate.

partnership debt due to them. The said Michael M'Donald died on the 5th March, 1899, and letters of administration of his estate were granted to the said James M'Donald. The said James M'Donald filed a petition in Bankruptcy for the purpose of effecting an arrangement with his creditors on the 23rd February, 1905, and, on the 27th April, 1906, the petition of the said James M'Donald to vest all his estate in the official assignees for realization was assented to by the creditors, and was duly confirmed by the Court on the 15th May, 1906. Liberty to intervene in this petition was, on the 8th May, 1906, given to Alexander Knox M'Entire, one of the said official assignees, for the purpose of recovering the amount due on foot of the said mortgage, dated the 23rd September, 1880.

On the 12th January, 1884, one George Burgess obtained a judgment in the Queen's Bench Division of the High Court of Justice in Ireland against the said Richard Fielding Morrison for the sum of £196 2*s.* 8*d.* and £5 6*s.*, making together £201 8*s.* 8*d.*, which judgment was, on the 26th January, 1884, registered as a mortgage against (*inter alia*) the premises comprised in the absolute order for sale in this petition.

By an order of Mr. Justice Ross, dated the 6th June, 1906, it was (*inter alia*) directed that the title of this matter should be amended by continuing the proceedings in the name of the said Richard Hobart Morrison, as devisee and legatee for life under the will of the said R. F. Morrison, deceased, as owner, that the carriage of the proceedings should be transferred to Richard Noel Guinness, solicitor for R. W. Sandford and St. R. Guinness, the first incumbrancers, and that the said A. K. M'Entire should be appointed receiver over the rents and profits of the lands comprised in the absolute order for sale.

On the 18th July, 1906, an application on behalf of the owner was made to Mr. Justice Ross for an order, declaring that the said mortgage, dated the 23rd September, 1880, from Richard Fielding Morrison to James M'Donald and Michael M'Donald, and also the said judgment mortgage registered by George Burgess on the 26th January, 1884, were not valid and subsisting charges affecting the lands, the subject-matter of the proceedings, and that the same were barred by the Statute of Limitations, and

that so much of the said order, dated the 6th June, 1906, as appointed the said A. K. M'Entire receiver over the said lands, should be discharged. This application Mr. Justice Ross refused with costs, and the owner appealed.

T. F. Molony, K.C., and *Coll*, for the owner :—

The absolute order for sale in this case was made in 1876, and we contend that, on the true construction of sect. 53 of the Landed Estates Court Act of 1858, that order did not enure for the benefit of the owners of charges upon the lands comprised therein, created in 1880 and 1884, respectively, so as to prevent the ordinary operation of the Statute of Limitations. The Land Judge, in making an absolute order for sale, has regard to the general interests of the estate and of the incumbrancers thereon at the date of the order. In *In re Colclough* (1) Blackburne, L.J., said :—"Where an order for a sale has been made, that order is to be considered as having been made on behalf of every person who has an interest in the proceeds of the sale; and a party thus interested is therefore exonerated from the necessity of taking proceedings which might otherwise have been necessary." Lord Justice Christian, in expanding this proposition in *In re Nixon's Estate* (2), said : —"The form of the order for sale is that the lands be sold for the purpose of discharging incumbrances thereon. Two things seem to be thereby adjudged—first, a conversion of the land into money; second, a distribution of that money among the incumbrancers: that is to say, among those whose claims *then*, i.e. *at the date of the order*, bind the land." See judgment of Monroe, J., in *In re Stinson's Estate* (3). No doubt, a valid judgment mortgage could have been registered against the lands, notwithstanding the absolute order for sale, as in *In re Scanlan's Estate* (4); but the Statute of Limitations would run against such a subsequent incumbrance, and the owner of the charge would require to protect himself by filing a supplemental petition. The decisions in *In re Belton's Estate* (5) and *In re Swanton's Estate* (6) are opposed to our contention, but they rest on a misconception of

(1) 8 Ir. Ch. R. 330.
(2) Ir. R. 9 Eq. 7.
(3) 29 L. R. Ir. 490, at p. 495.
(4) [1897] 1 I. R. 462.
(5) [1894] 1 I. R. 537.
(6) [1898] 1 I. R. 157.

Appeal. 1906.

In re Morrison's Estate.

the decisions in *In re Colclough's Estate* (1) and *In re Nixon's Estate* (2).

Gordon, K.C., and *Corvan*, for the official assignee, and *Herbert Wilson, K.C.*, for the judgment mortgagee, George Burgess, were not called on.

Sir Samuel Walker, C. :—

We do not require to hear counsel for the respondents in this case, as we are clearly of opinion that the order made by Mr. Justice Ross, following his own decision in *In re Swanton's Estate* (3), was right, and necessarily follows from the application of the principle laid down in *In re Colclough's Estate* (1) and *In re Nixon's Estate* (2). When Christian, L.J., in the latter case, said that by an order for sale there was adjudged a distribution of the money, resulting from the conversion of the land, among the incumbrancers whose claims "*then*, i.e. at the date of the order," bound the land, he was, no doubt, using words apposite to the state of facts before the Court. But I do not think he intended to lay down any principle applicable to the facts of the present case. It appears to me that the facts of this case are stronger than those in either *In re Colclough's Estate* (1) or *In re Nixon's Estate* (2). Here the incumbrances in question were created after the conversion of the estate by the absolute order for sale; any application for payment by the owners of these charges could only be met by payment out of the funds arising from the sale; and if a new petition were presented on behalf of either of the owners of these subsequent charges, I am satisfied that such a petition would have been dismissed with costs.

It would be strange that a mortgagee whose mortgage was created before the date of the order for sale, and against whom eleven years and 364 days had run, should not be barred, but that one whose mortgage was created after the order for sale, and against whom twelve years had run, should be.

In my opinion, the order of Mr. Justice Ross, giving the carriage of the proceedings to Mr. Guinness, was made for the benefit

(1) 8 Ir. Ch. R. 330. (2) Ir. R. 9 Eq. 7. (3) [1898] 1 I. R. 157.

of all incumbrances existing at that time. No one ever heard of a new petition being allowed in the case of an incumbrancer whose charge was created after the date of the absolute order for sale. Such a creditor is entitled to a share in the funds when they are distributed. The practice of the Court for many years is in accordance with the order made by Mr. Justice Ross. Charges created subsequently to the date of the order for sale have always been placed upon the schedule of incumbrances; searches have always been continued down to the date of the conveyance by the Land Judge, so as to include such subsequent incumbrances. This established practice shows what is the understanding of the rule laid down in *Colclough's Estate* (1).

The appeal must be dismissed.

FITZ GIBBON, L.J.:—

I have hitherto understood that, on a petition and absolute order for sale in the Land Judge's Court, the whole proceeding is *in usum jus habentis*; time is immaterial; and that, whenever the money resulting from the conversion of the land comes to be distributed, every incumbrancer who was entitled when the proceeding began, or who became entitled during its progress, must be paid. The Judge does not execute the conveyance until the searches have been brought down to date, and care is taken that no one then interested shall be left out. The analogy of an administration suit is close, and there debts becoming payable out of the estate down to the last moment are discharged. It would be a strange anomaly if an incumbrancer who would have been barred on the day after the decree for administration should be paid, but one whose charge arose on that day would be barred if the suit lasted for twelve years. I cannot see what the subsequent incumbrancer could do, which was not done already by the order to sell for payment of incumbrances.

The passage quoted from the judgment of Christian, L.J., in *Nixon's Estate* (2) was, in my opinion, not intended to have consequences which would be contrary both to my idea of the practice, and also to justice.

(1) 8 Ir. Ch. R. 330. (2) Ir. R. 9 Eq. 7.

Appeal.
1906.

In re MORRISON'S ESTATE.

HOLMES, L.J. :—

The decision in *In re Nixon's Estate* (1) was made in 1874—thirty-two years ago, and it must have been known to practitioners down to the present time; yet it was never supposed by Judges, examiners, or counsel, that it would prevent an incumbrance created after the absolute order for sale being placed on the schedule, even although, if the estate were not in Court, the incumbrance would have been barred by the Statute of Limitations at the time the money became available. Under the circumstances, we cannot now alter the established practice of the Court; and I have no doubt, adopting, as I do, the view and the language of Blackburne, L.J., in *Colclough's Estate* (2), that this appeal should be dismissed.

Solicitor for the appellant: *E. V. Garland.*
Solicitor for the respondents: *R. A. M'Namara.*

R. ST. J. C.

(1) Ir. R. 9 Eq. (2) 8 Ir. Ch. R. 330.

In the MATTER of the ESTATE of PATRICK JOSEPH BOLAND and JOHN P. BOLAND (1).

Ross, J.
1906.
Nov. 27.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 62 (1), (3).

Section 62 (3) of the Land Act, 1903, applies only in cases where the lands sold, and the other lands sought to be exclusively charged, are subject to the same superior interest. Therefore, on a sale, under the Land Act, 1903, to occupying tenants, of lands which had been conveyed to the vendors, subject to certain head-rents, but indemnified therefrom by other lands, which, previous to the conveyance to the vendors, had not been subject to these head-rents, the Court refused, as against the owners of the head-rents, to make an order exclusively charging the head-rents on the indemnifying lands.

Application for an order of exclusive charge.

By an indenture dated 27th August, 1863, being a fee-farm grant made pursuant to the Renewable Leasehold Conversion Act, William Hanford Flood granted to Isabella Savage the lands of Robertshill, consisting of 43 acres, subject to the yearly fee-farm rent of £24. The interest of William Hanford Flood became vested in Colonel J. C. Hanford. The interest of Isabella Savage became vested in Sir Henry Meredyth.

By an indenture dated 24th December, 1785, a perpetual yearly rentcharge of £30 Irish, now reduced to £20 15*s.* 6*d.*, was created, issuing out of the lands of Kilcreen, consisting of 161 acres. The said charge became vested in C. R. Tennant, and the said lands of Kilcreen became vested in Sir Henry Meredyth. The lands, the subject of the proceedings for sale in this matter, together with other lands, became vested in the vendors under a conveyance dated 2nd August, 1901, made between Sir Henry Meredyth of the one part, and the vendors of the other part, whereby Sir Henry Meredyth granted unto the vendors, firstly, the townlands of Kilcreen, containing 161 acres; secondly, part of the lands of Palmerstown; thirdly, part of the lands of Robertshill, containing 26 acres, subject to the annual fee-farm rent of £24, but indem-

(1) Before Ross, J., sitting as a Judicial Commissioner.

Ross, J. 1906. *In re* BOLAND'S ESTATE.

nified therefrom by the remaining portion of the said lands of Robertshill, and by the lands of Palmerstown. The said lands were conveyed, subject as to such portion thereof as was properly liable thereto to the payment of the perpetual rentcharge of £20 15*s.* 6*d.*, but indemnified therefrom by the residue of said lands of Palmerstown, retained by Sir Henry Meredyth. Patrick Boland and John P. Boland afterwards sold the lands to the occupying tenants under the Act of 1903.

The rulings on title issued by the examiner in the matter directed that the vendors should procure an order exclusively charging the rentcharges and other charges in accordance with the indemnities provided by the indenture of 2nd August, 1901.

The vendors made the present application for an order exclusively charging the whole of the perpetual yearly rentcharge of £24 on the residue of the lands of Robertshill remaining unsold, and on the townlands of Palmerstown containing 199 acres, and exclusively charging the rentcharge of £20 15*s.* 6*d.* on the said lands of Palmerstown.

P. A. O'C. White, for the vendors, cited sect. 62 (3) of the Irish Land Act, 1903 (1).

[Ross, J.: Does not that section apply only where the superior interest was by the original deed made to issue out of all the lands?]

If both lands are now subject to the superior interest, the Court may charge the whole on the indemnifying lands.

C. A. O'Connor, K.C., for J. C. Hanford, owner of the fee-farm rent of £24:—

Colonel Hanford has no privity with the indemnifying deed. The indemnity deed of 1901 would not afford him, in the event of non-payment of the rent, the same remedies by ejectment, &c.,

(1) Section 62 (3) of the Irish Land Act, 1903, is as follows:—"Where in the like case the Court is satisfied that the land sold is entitled to be indemnified against any claim in respect of a superior interest by other lands, and that the other lands are a sufficient security therefor, the Court may, upon such terms (if any) and in such manner as appears equitable, exclusively charge the whole of the superior interest upon the other lands."

against the lands of Palmerstown, which he now enjoys as against the lands of Robertshill. Nothing is known as to Sir Henry Meredyth's title to the indemnifying lands. A charge imposed by a deed of indemnification is not a superior interest.

H. R. Poole, for C. R. Tennant, owner of the fee-farm rent of £20 15*s.* 6*d.* :—

The lands of Kilcreen are not subject, in conjunction with the lands of Palmerstown, to any charge. I have no claim against Palmerstown, and can get no relief if my charge is thrown on Palmerstown.

White, in reply.

[Ross, J., referred to sect. 31 (8) of the Land Act, 1896.]

Ross, J. :—

I think it best to decide the net point without asking the parties to serve notice on Sir Henry Meredyth. I am of opinion that sub-sections 1, 2, 3 of sect. 62 of the Irish Land Act, 1903, are all applicable to three varieties of the same general case. The Court is at liberty to use the section where the superior interest issues out of different denominations of lands.

The facilities given by the section can be made use of—(1) where the Court is satisfied that, for a period of not less than twenty years prior to the sale, no payment has been made in respect of the superior interest by the owner of the land sold, and that the other lands subject thereto are a sufficient security therefor—in that case the purchase-money may be distributed without regard thereto; (2) exactly in the same way the Court can sell and distribute the money without regard to the balance, where for twenty years a fixed proportion of the head-rent has been borne by the owner of the land sold, and the other lands are a sufficient security for the balance; (3) the same course is to be pursued in cases coming under sub-sect. 3. The expression "other lands" means the other lands subject to the same superior interest; and, where these other indemnifying lands are a sufficient security, the Court may exclusively charge the whole of the superior interest

Ross, J. 1906. *In re* BOLAND'S ESTATE. Ross, J.

upon the other lands. But it is an astonishing proposition to lay down that where other lands, in any other part of Ireland, have, by a contract to which the owner of the head-rent was a stranger, been subjected to the head-rent, the owner of this head-rent is to take as his security these other lands, about which or their title he knows absolutely nothing. If the Legislature intended anything so extraordinary, it must say so in unmistakable terms.

The applications as to the perpetual yearly rentcharges of £20 15*s.* 6*d.* and £24 must be refused with costs.

Solicitor for the vendors: *Joseph Tierney.*
Solicitor for J. C. Hanford: *J. E. MacDermott.*
Solicitors for C. R. Tennant: *Reeves & Sons.*

D. M. S.

Wylie, J. 1906. Dec. 13, 19.

IN THE MATTER OF THE ESTATE OF HENRY THOMAS FINLAY.

Marriage settlement—Annuity—Duration—Terminable or perpetual.

By marriage settlement L. R., being entitled to certain lands, held under a bishop's lease for twenty-one years, customarily renewable, and also to certain other lands, held under a lease for a term of sixty-one years, demised the former to the trustees of the settlement for the term of 100 years, and the latter for a term of thirty years, upon trust after the solemnization of the intended marriage for the said L. R. and his assigns during the residue of the said terms of 100 years and thirty years, if he should so long live; and from and after the decease of the said L. R., during the continuance of the said terms, in trust to permit T. O'N. (the intended wife), if she should survive the said L. R., yearly, during as many years of the said terms as she should survive the said L. R., to have, receive, and take out of the said premises an annual sum or yearly rentcharge of £300, as and for her jointure, and also the said annuity or yearly rentcharge of £300, to be charged and chargeable on the said lands for ever, in trust, after the decease of the said T. O'N., for the issue of the marriage, in such shares as the said L. R. and T. O'N. should appoint; and in default of appointment, share and share alike. The lands comprised in the said bishop's lease were subsequently conveyed to the said L. R. in fee-simple:—

Held, that the annuity was terminable by the expiration of the terms vested in the trustees.

QUESTIONS submitted by the examiner for the opinion of the Judicial Commissioner. By settlement dated 1st November, 1827, and made on the occasion of the marriage of Laurence Rorke with Teresa O'Neill, reciting that the said Laurence Rorke was entitled to (*inter alia*) the town and lands of Donagh O'Darrighall, Bushelloaf, Knockmaguire, the Culleghs, Millfield, Bonaghmore, with certain pasture grounds called the Liskeen, and other denominations, containing 177A. 2R. 2P., situate in the town and fields of Clondalkin, barony of Upper Cross, and county of Dublin, held under a bishop's lease, dated 16th March, 1811, for the term of twenty-one years from 25th December, 1810, and for all such further and other term or terms as might for ever thereafter be granted, pursuant to a covenant for perpetual renewal therein contained (the last renewal whereof being dated the 1st November, 1826), subject to the yearly rent of £20, and to the further covenants and conditions contained in the said lease; also to the lands of Kilmartin, situate in the barony of Castleknock and county of Dublin, containing 373 acres plantation measure, held under a lease dated the 19th May, 1796, and made between Patrick M'Loughlin of the one part, and the said Laurence Rorke and Edmond Rorke of the other part, for the term of sixty-one years, from the 1st May, 1796, subject to the yearly rent of £363 13*s.* 6*d.*, and to the covenants and conditions therein contained, the said town and lands comprised in the said lease of the 16th March, 1811, were granted and demised to the trustees named in the said settlement, their executors, administrators, and assigns, for the term of 100 years from the date thereof; and the said town and lands comprised in the said lease of the 19th May, 1796, were granted and demised to the said trustees, their executors, administrators, and assigns, for the term of thirty years, from the 1st November, 1826, yielding therefor, during the said respective terms, to the said Laurence Rorke, his executors, administrators, and assigns, for each of the said several denominations, the rent of a peppercorn, if demanded, upon trust, after the solemnization of the said marriage, that the said trustees should, out of the rents and profits of said lands and premises, pay the rents reserved by the said indentures of lease, and renew the said bishop's lease from time to time, and pay the fines and other necessary charges of such renewals, and subject thereto,

Wylie, J. 1906.

In re FINLAY'S ESTATE.

should stand possessed of the said premises in trust for the said Laurence Rorke and his assigns, and permit him and them to receive and take the rents, issues, and profits thereof during the residue of the said terms of 100 years and thirty years, if he should so long live, to and for his and their own use and benefit, and from and after the decease of the said Laurence Rorke, during the continuance of the said terms, in trust, to permit the said Teresa O'Neill, if she should survive the said Laurence Rorke, yearly, during so many years of the said terms as she should survive the said Laurence Rorke, to have, receive, and take out of the said premises an annual sum or yearly rentcharge of £300, as and for her jointure, the same to be in lieu and bar, and in full satisfaction of all dower and thirds, *and also the said annuity or yearly rentcharge of £300 to be charged and chargeable on the said lands for ever*, in trust, after the decease of the said Teresa O'Neill, for the issue of the marriage, in such shares as the said Laurence Rorke and Teresa O'Neill should appoint, and in default of such appointment, share and share alike, the same to be paid and payable by two equal half-yearly payments on every 1st May and 1st November in every year during the natural life of the said Teresa O'Neill, with powers of entry and distress to the said Teresa O'Neill and her assigns during the term of her natural life, in case of non-payment. The settlement contained the following covenants by the said Laurence Rorke with the said trustees, that he, the said Laurence Rorke, his executors, administrators, and assigns, or some, or one of them, should and would, from time to time, and at all times for ever thereafter, use his and their best endeavours to keep the said premises, demised by the said lease of 1st November, 1826, renewed, and should and would pay, or cause to be paid, all fines, fees, dues, costs, and expenses of all and every renewal and renewals thereof, so as that a subsisting term of twenty-one years should, as far as possible, be always kept up in the said premises, and further that he, the said Laurence Rorke, his executors, administrators, and assigns, should and would, from time to time, and at all times for ever thereafter, pay the rent and perform the covenants in the said lease of 1st November, 1826, mentioned, which, on the part of the lessee therein, were or ought to be paid or performed, and that the said trustees, their executors,

administrators, and assigns, should and might have and enjoy the said premises with the appurtenances, and take and receive the rents, issues, and profits thereof during the terms of 100 years and thirty years thereinbefore granted to them (provided the terms by the said lease granted, or to be granted by any renewal thereof, should so long last), and, lastly, that he, the said Laurence Rorke, his executors, administrators, and assigns, should and would, from time to time, and at all times thereafter, do, execute, and procure all such further lawful and reasonable acts, deeds, and assurances as the said trustees, their executors, administrators, or assigns, should reasonably require for the better and more perfectly granting and assuring the said premises with the appurtenances to the said trustees, their executors, administrators, and assigns, during the said terms of 100 years and thirty years, or during such part of the said terms as there should be any subsisting interest in the said premises; and it was thereby agreed and declared that, when the trusts thereinbefore declared of and concerning the said term of 100 years should be fully performed, or become unnecessary or incapable of taking effect, then the said terms of 100 years and thirty years should absolutely cease, determine, and be void.

By perpetuity grant, dated 21st November, 1836, the Ecclesiastical Commissioners conveyed the lands comprised in the said bishop's lease of 16th March, 1811, in fee to the said Laurence Rorke, subject to the perpetual yearly rent of £95 5*s.* 3*d.*, and by sub-grant in perpetuity, dated 4th April, 1840, the said Laurence Rorke granted portion of the said lands (being the lands comprised in the estate sold in this matter) to Thomas Finlay (a predecessor in title of the vendor), subject to the perpetual yearly rent of £29 6*s.* 8*d.*

The said Teresa Rorke, otherwise O'Neill, died in 1835, and the said Laurence Rorke died in 1859, intestate. There were six children of the marriage. Of these, two died in infancy. The remaining four survived the said Laurence Rourke, and attained the age of twenty-one years. No appointment was made of the said annuity of £300; and, on the death of the said Laurence Rorke, the said annuity of £300 was treated as having become vested in equal shares in the said four surviving children.

By indenture, dated the 4th October, 1901, Laurence Bernard

Wylie, J. 1906.

In re FINLAY'S TRUSTS.

Rorke, one of the said surviving children, conveyed the lands comprised in the said grant of 21st November, 1836, and also his share in the said annuity of £300, and a further share therein to which he had become entitled by way of mortgage to secure £800 and interest. This mortgage had become vested in Augustine F. Baker, as personal representative of the mortgagee.

The following questions were submitted:—

1. Was the annuity of £300 created by the settlement of 1st November, 1827, a perpetual annuity in the events which happened, or was the same a terminable annuity?

2. If the same was a terminable annuity, is the whole thereof now payable, or have or has any parts or part thereof ceased to exist?

Pierce Nolan, for Laurence Bernard Rorke:—

There are no words of limitation. Accordingly, the annuity expires on the death of each child, or at the outside on the expiration of the term vested in the trustees. Once the term has expired, there is no estate in the trustees to feed the annuity: *In re Gillman's Estate* (1). [He also cited *In re A. L. Smith's Estate* (2).]

Mountifort G. Longfield, for Augustine F. Baker:—

Having regard to the nature of the subject-matter with which the settlor was dealing, the insertion of the words "for ever" makes the annuity perpetual. The fact that the lease was at the time only a renewable lease, does not restrict the operation of the deed by which the annuity was charged: *In re Connolly's Estate* (3). The intention was that the annuity should be perpetual. Effect must be given to the words "for ever": *Taylor* v. *Martindale* (4), followed in *Joynt* v. *Richards* (5).

Cur. adv. vult.

(1) I. R. 10 Eq. 92.
(2) [1905] 1 I. R. 453.
(3) I. R. 3 Eq. 339.
(4) 13 Sim. 158.
(5) 11 L. R. Ir. 273.

Wylie, J.
1906.
In re FINLAY'S TRUSTS.
Dec. 19.

WYLIE, J:—

In this case the examiner has submitted to me for my opinion the question whether a certain annuity of £300, created by a settlement of 1st November, 1827, is perpetual or terminable, and if terminable, what are its limits?

The settlement creating the annuity was executed on the marriage of Laurence Rorke with Teresa O'Neill. It recites the title of Laurence Rorke to the settled premises, which consisted of the lands sold in this matter (with others), then held by Laurence Rorke under a bishop's lease for twenty-one years, customarily renewable, and also the lands of Kilmartin, held under another lease for the residue of a term of sixty-one years. Having thus a chattel interest in both these sets of premises, Laurence Rorke demised the former to the trustees of the settlement for a term of 100 years, and the latter for a term of thirty years, upon trust, after the solemnization of the marriage, that the trustees should out of the rents and profits pay the rents reserved by the two leases, and the fines and other necessary charges for the renewal of the bishop's lease, and subject thereto in trust for Laurence Rorke for the residue of the terms of 100 years and thirty years, if he should so long live, and from and after his decease, during the continuance of the terms, in trust to permit Teresa O'Neill, if she should survive the said Laurence Rorke, yearly, during so many years of the said terms of 100 years and thirty years as she should live after the death of her husband, to receive and take out of the said premises an annual sum or yearly rentcharge of £300 as and for her jointure, and also the said annuity or rentcharge of £300, to be charged and chargeable on the said lands for ever: in trust, after the death of the said Teresa O'Neill, for the issue of said marriage, as the husband and wife should appoint, and, in default of appointment, share and share alike, the same to be paid and payable by half-yearly payments on 1st May and 1st November in every year during the natural life of the said Teresa O'Neill, with powers of distress and entry to the said Teresa O'Neill, in case of non-payment. Then follow covenants by Laurence Rorke with the trustees, that he, his executors, or administrators, would at all times for ever thereafter use his and their best endeavours to keep the bishop's lease renewed, and

Wylie, J. 1906. *In re* FINLAY'S ESTATE.

pay the rent and perform the covenants on the lessee's part in the bishop's lease contained, and that the trustees might enjoy the premises and take the rents and profits during the terms of 100 years and thirty years, provided the terms in the said leases granted or to be granted by renewal should so long last; and then there is a covenant by Laurence Rorke for further assurance during the said terms of 100 years and thirty years, followed by a proviso, that when the trusts thereinbefore declared concerning the said term of 100 years should be fully performed and satisfied, the said terms of 100 years and thirty years should cease and be void.

Now there is nothing else in the deed which seems to me to throw any light upon the construction of the trust declared in the settlement in respect of the annuity of £300 in favour of the issue of the marriage. The words upon which the question for decision arises are these—"and also the said annuity or rentcharge of £300 to be charged and chargeable on the said lands for ever, in trust after the death of the said Teresa O'Neill, for the issue of the said marriage in such shares as the said Laurence Rorke and Teresa O'Neill shall appoint; and in default of such appointment, share and share alike." On looking at the original settlement, it appears that the above words were interlined after the deed was engrossed, and it is evident from the deed that their insertion was an afterthought, because they are inserted in the middle of a sentence dealing with the wife's jointure, and they do not read in with what follows, and the primarily declared purpose of the deed was merely to make a provision for the wife in case she survived the husband. However, the words are now in the deed, and the question is—what is their effect? Do they vest in the issue a perpetual annuity, or an annuity for their lives only, or one co-extensive with the terms of years vested in the trustees? If the words "for ever" had been omitted from the clause, I think, having regard to the authorities, which are all fully discussed in *In re Foster's Estate* (1), the annuities would have been for life only. But the words "for ever" are there, and some effect must be given to them if possible. If, at the date of the settlement, the

(1) 23 L. R. Ir. 269.

settlor had been owner in fee, and had vested the fee in the trustees, the clause in question would, in my opinion, have given a perpetual annuity to the issue. But where, at the date of the settlement, the settlor has only a limited chattel interest, and demises the premises to the trustees, merely for terms of 100 years and thirty years respectively, and where the trust in favour of the issue is declared in respect of those terms, can the annuity extend beyond the limits of the trust, merely because the settlor has, since the execution of the settlement, acquired the fee. I think not. In my opinion, therefore, the way in which effect can be given to the words "for ever" is to extend the annuities beyond the lives of the annuitants which would have been their limits if the words "for ever" had been omitted, and make them co-extensive with the terms vested in the trustees. A similar construction is given to the words "for ever" by the deed itself, where they occur in the settlor's covenants for payment of rent, renewal, and further assurance. I will, therefore, answer the first question by saying that the annuity is not perpetual, but terminable by the expiration of the terms vested in the trustees of the settlement. The answer to the second question will be that the whole annuity is payable till the 1st November, 1927.

Solicitors for Laurence Bernard Rorke: *O'Hagan & Son.*
Solicitors for Augustine F. Baker: *Baker & Ringwood.*

J. E. W.

Appeal. 1906. Dec. 5, 6.

In the MATTER of the ESTATE of FRANCES HENDY HARRIS, Deceased; LETITIA FRANCES LYONS *v.* REGINALD THOMAS HARRIS (1).

(1905. No. 882.)

Will—Construction—Tenant for life and remainderman—Wasting property—Conversion.

A testatrix, after certain specific legacies, left the rest and remainder of her property of every kind, both real and personal (which included leaseholds), to her trustees, upon trust to pay A an annuity of £250, and directed the remainder of the income to be derived from her said property, or the investments representing the same, to be paid to her husband during his life, and after his decease to B, C, and D, in certain shares. She directed that, in the event of A dying without issue, the incomes so provided for should be increased by the amount of his annuity; but that, if A died leaving issue, the said annuity should be paid for the benefit of his child or children, until he or they attained the age of twenty-one years, when, out of all her said property, a sum of £4000 was to be raised, and distributed as directed in the said will. Subject thereto, the testatrix gave all her property to B, C, and D, in certain shares.

Held, that there was no sufficient indication of intention on the part of the testatrix that the property should be enjoyed *in specie*, to exclude the application of the rule of law laid down in *Howe* v. *Lord Dartmouth* (7 Ves. 137), and that the property should be converted for the benefit of those entitled in remainder.

Originating Summons by the plaintiff, a residuary legatee in remainder under the will of Frances Hendy Harris, deceased, for an order for the administration of the personal estate of the said Frances Hendy Harris, and the carrying into execution of the trusts of the said will, which was dated the 5th December, 1902, and probate of which was on the 24th December, 1903, granted to the plaintiff and defendant.

By her said will, the testatrix, after certain specific bequests, provided as follows:—"All the rest and remainder of my property of every kind, both real and personal, after payment thereout of

(1) Before Sir Samuel Walker, C., and Fitz Gibbon and Holmes, L.JJ.

any debts I may owe, and my testamentary expenses, I leave, devise, and bequeath to the trustees or trustee of this my will, upon trust, in the first place to pay annually to my nephew, Espine Ward, for his life, the sum of £250, said annuity to be paid half-yearly, the first payment to be made six months after my death; subject to the payment of said annuity, I will and direct my said trustees to pay the remainder of the income to be derived from all my said property, or the investments representing the same, to my husband for his life, and after his decease to pay said remainder of the income as follows, that is to say, one-half of said income to my niece, Leta Lyons, the remaining half in equal shares to my nieces, Mary and Elinor Daly, now residing in Australia. After the death of Espine Ward, should he die without leaving issue, the annuity payable to him will cease, and the income payable as above-mentioned will be augmented to this extent, but in the event of my said nephew dying, leaving issue him surviving, then I desire and direct my trustees to pay said annuity of £250 for the benefit of the children of the said Espine Ward, until they all, if there is more than one, or until he or she in case of there being only one child, attain twenty-one years, whereupon my trustees are to cease paying such annuity, and instead thereof they are to raise out of all my said property a sum of £4000, and to pay same to the child or children of said Espine Ward, who shall have lived to attain twenty-one years, if more than one in equal shares amongst such children. Subject to the payment of the annuity of £250 as above mentioned, and the sum of £4000 if same becomes payable, and subject to the life-interest of my husband, as mentioned hereinbefore in the income of my said property, my niece, Leta Lyons, is to take one-half of my said property absolutely, and my said two nieces, Mary and Elinor Daly, to take the remaining half absolutely, but in equal shares, but this absolute gift is subject as aforesaid. I appoint my husband, Reginald T. Harris, and my said niece, Leta Lyons, to be trustees of this my will, and my executor and executrix."

The property of the testatrix consisted (*inter alia*) of two houses in the city of Dublin held upon leases, the terms of which had thirty and forty years to run respectively, and the object of the

Appeal. 1906.

LYONS v. HARRIS.

order sought was to enforce the conversion of the said leaseholds, as being wasting property. By an order of Mr. Justice Barton, dated the 15th day of December, 1906, made on the hearing of this summons, the plaintiff's application was refused, the learned Judge being of opinion that it was the intention of the testatrix that the property bequeathed by her will should be enjoyed in specie, and that, under the circumstances of the case, the general rule as to conversion of wasting securities by executors did not apply.

From this order the plaintiff now appealed.

Charles A. O'Connor, K.C., and *Newett*, for the appellant:—

This is a clear case for the application of the rule in *Howe* v. *Lord Dartmouth* (1). It is impossible to gather from the will any indication of an intention on the part of the testatrix that the property was to be enjoyed *in specie*. That being so, the rule must apply, and the onus of showing that it is excluded rests on the respondent, who contests its application: *Macdonald* v. *Irvine* (2).

There is here no use of the word "rents" as in *Pickering* v. *Pickering* (3); nor is there any direction as to the enjoyment of the property which would postpone conversion. The word "income" is neutral. *Macdonald* v. *Irvine* (2) rules this case, which is a clearer one for the application of the rule than *In re Game* (4). [They also referred to *Collins* v. *Collins* (5); *Morgan* v. *Morgan* (6); *Bethune* v. *Kennedy* (7).]

Matheson, K.C., and *Best*, for the respondent (R. T. Harris):—

We contend that there is sufficient indication of an intention on the part of the testatrix that the property should be enjoyed as it was left at her death to exclude the application of the rule. The testatrix throughout was dealing with the same thing—"the remainder of my said property." Espine Ward was entitled to payment of the annuity bequeathed to him out of the testatrix's

(1) 7 Ves. 137.
(2) 8 Ch. D. 101.
(3) 2 Beav. 31; 4 My. & Cr. 289.
(4) [1897] 1 Ch. 881.
(5) 2 Myl. & K. 703.
(6) 14 Beav. 72.
(7) 1 Myl. & Cr. 114.

property as it stood at her death; it could not be converted to his prejudice, and it is only on the determination of the annuity that the sum of £4000 is to be raised. The use of the word "income" is in favour of our contention. The rule of law is not now enforced as strictly as formerly: *Pickering* v. *Pickering* (1); *Alcock* v. *Sloper* (2); *Collins* v. *Collins* (3).

O'Connor was not called upon in reply.

SIR SAMUEL WALKER, C.:—

Dec. 6.

The question in this case is whether the well-known rule established in *Howe* v. *Lord Dartmouth* (4) applies to the bequest in this will, or whether the case is taken out of the rule by an intention to enjoy the property *in specie* being shown by the language of the will. The general rule is, that where there is a general residuary bequest of personal estate, including chattels real, to be enjoyed by persons in succession, the Court puts upon the bequest the interpretation that the persons indicated are to enjoy the same thing in succession, and converts the property as the only means of giving effect to that intention.

It is said, in at least one case, that a slight indication of intention to the contrary will be sufficient, but I adopt the rule laid down by James, L.J., in *Macdonald* v. *Irvine* (5), that the rule in *Howe* v. *Lord Dartmouth* (4) must be applied unless, upon the fair construction of the will, you find a sufficient indication of intention that it is not to be applied, and that the burden in every case is upon the person who says the rule of the Court ought not to be applied in the particular case.

There are numerous cases in which the burden was held to be discharged by the language of the particular will in question, and two especially were referred to by Mr. Matheson: *Collins* v. *Collins* (3) and *Pickering* v. *Pickering* (2), which he said were undistinguishable from the present.

The first consideration is the language of the will we have to construe:—[His Lordship referred to the terms of the will].

(1) 2 Beav. 31; 4 Myl. & Cr. 289.
(2) 2 Myl. & K. 699.
(3) *Ibid.* 703.
(4) 7 Ves. 137.
(5) 8 Ch. D. 101.

Appeal. 1906.

LYONS v. HARRIS.

Sir Samuel Walker, C.

The leading subject dealt with all through is "the rest and remainder of my property of every kind." It is out of that the annuity is given, and what is given to the husband for life in the first instance is "the remainder of the income to be derived from my said property or the investments representing the same"; this clause is more consistent with the interpretation "investments for the time being," but the meaning is not very clear, and the same remaining income, after his decease, is given to the two nieces. It is out of the same property the £4,000 is to be raised if it becomes payable; and, subject to the annuity and the husband's life estate, the appellant gets "one-half of my said property" absolutely, and the other two nieces the remaining half absolutely. Each of the devisees gets the same subject described in the same words, one getting it for life and the others in succession.

Prima facie, a clearer case for the application of the rule in *Howe* v. *Lord Dartmouth* (1) cannot be stated.

Let us see now what were the bequests in the two cases mainly relied on. In *Collins* v. *Collins* (2) the bequest was: "I give to my wife, Sarah Collins, all and every part of my property in every shape, and without any reserve, and in whatsoever manner it is situated, for her natural life; and at her death the property is left to be divided in the following manner." The Master of the Rolls gives no reasons for his conclusions, but the argument shows that the points relied on were the words, in the wife's case, "without any reserve," and the language of the direction for the division as showing there was to be no conversion till after the decease of the wife.

In *Pickering* v. *Pickering* (3) the bequest was as follows:—"I give and bequeath to my said wife all the interest, rents, dividends, annual produce and profits, use and enjoyment of all my estate and effects whatsoever, real and personal, for and during the term of her natural life." It appears the executors paid the income to the wife as if she was entitled in specie for thirty years, which influenced Lord Cottenham in his decision, but he relies on—(1) *Collins* v. *Collins* (2) in the direction to divide after the death; (2) the gift of the rents, dividends, annual

(1) 7 Ves. 137. (2) 2 Myl. & K. 703. (3) 2 Beav. 31; 4 Myl. & Cr. 289.

produce and profits, during her life; (3) the language of the specific gift of the chattels; and, lastly, the gift, after her life, of "the rest and residue of the estate," which was not the rest and residue at the testator's death. The judgment of Lord Langdale proceeded mainly upon the language of the gift to the wife herself.

On the other hand, the case of *Macdonald* v. *Irvine* (1) seems a very strong authority in favour of the appellant:—[His Lordship referred to the terms of the will there in question, and continued]. Thesiger, L.J., there said: "I come to the consideration whether there can be gathered from the will and codicil in the present case any expression of intention that the property in question is to be enjoyed *in specie*. In almost all, if not all, the cases which have been cited in argument, where such an intention was found to exist, we find either words, in their natural and literal sense, importing use and enjoyment of the property in the state in which the testator left it at his death, or directions contained in the will as to the conversion of the property which were inconsistent with a conversion by the Court taking place upon the death of the testator." On those grounds he distinguished *Collins* v. *Collins* (2) and *Pickering* v. *Pickering* (3). Baggallay, L.J., who dissented, rested his judgment upon the language of the codicil, upon which, no doubt, there was much to be said.

The case of *In re Game* (4) is very like the present. There the testator, after certain specific bequests, directed that the rents and profits of his residuary real and personal estate which he might be possessed of or entitled to at the time of his decease, should be paid to his wife for life, for her own use and benefit, and after her death, he gave his residuary estate to others in succession, subject to certain annuities, and conferred upon the annuitants a power of distress. Stirling, L.J., there held that neither the use of the word "rents," nor the power of distress conferred on the annuitants, was enough to exclude the rule in *Howe* v. *Lord Dartmouth* (5).

There may be a difficulty in reconciling all the cases cited,

(1) 8 Ch. D. 101.
(2) 2 Myl. & K. 703.
(3) 2 Beav. 34; 4 Myl. & Cr. 289.
(4) [1897] 1 Ch. 881.
(5) 7 Ves. 137.

Appeal. 1906.

LYONS v. HARRIS.

Sir Samuel Walker, C.

and an element of difference may be noted in some of them, as in *Morgan* v. *Morgan* (1), by the direction as to varying investments.

But the case before the Court appears to me a typical one for applying the rule in *Howe* v. *Lord Dartmouth* (2). What is dealt with, in the first instance, is "the rest and remainder of my property of every kind." It is all through, both as regards the tenant for life and those taking in remainder, spoken of as "my said property." There is no postponing of conversion beyond what is implied in every gift to a tenant for life and remaindermen. According to the argument, if three-fourths of the property consisted of wasting securities, there could be no conversion. Further, the £4,000 could clearly be raised out of the house property as well as the other.

Upon the whole, I see no sufficient indication of intention to prevent the application of the rule of law in *Howe* v. *Lord Dartmouth* (2), and the order of Mr. Justice Barton must be discharged.

FITZGIBBON, L.J.:—

Not alone on its facts, but also on the language of Lord Cottenham, *Pickering* v. *Pickering* (3) is a good illustration of the difficulty that arises in cases such as this; and it goes far to show that the present is a typical case for acting on *Howe* v. *Lord Dartmouth* (2), and holding that there is no evidence of an intention on the part of the testatrix that the property should be enjoyed *in specie* by the life-tenant, sufficient to prevent the duty, and the normal course, of realising and investing capital of a wasting nature.

In *Pickering's Case* (3) a son and mother had for thirty years acted on the principle that the mother was entitled to enjoy the property *in specie*, and, subsequently, in consequence of the failure of other property, it occurred to the son to get her to state an account on the opposite basis. After the mother's death, proceedings were commenced to set aside this account, and Lord Cottenham held that the son was not entitled to maintain it as a settled account. The question as to conversion then arose upon the will,

(1) 14 Beav. 72. (2) 7 Ves. 137. (3) 2 Beav. 31; 4 Myl. & Cr. 289.

and the learned Judge held that, to avoid conversion, an affirmative intention must be found on the face of the will, or from the circumstances, that the testator's property should be enjoyed by those to whom he gave limited interests in it, in the same condition in which he left it. It seems to be the fashion to go into small considerations in arriving at a conclusion. In *Pickering's Case* (1) the enumeration of the classes of property, and the different terms employed to describe the way in which it was to be enjoyed, would have gone far to lead me to the conclusion that the testator looked forward to the wife's enjoying what he left behind him, by using it in the same way in which he would himself have used it if he were alive. He speaks of "interest, rents, dividends, annual produce and profits, *use and enjoyment*, of all my estate *and effects* whatsoever, real and personal, for and during the term of her natural life." The will here, on the contrary, speaks of "the remainder of *the income* to be derived from *all my said property, or the investments representing the same.*" This actually contemplates conversion and reinvestment, and amalgamation of all the assets into one cash-producing fund. Again, the direction that, in certain events, the annuity should cease, and that the large sum of £4000 should be raised "out of all my said property," although contingent, shows that a state of facts was contemplated in which money would have to be raised out of the leaseholds as well as out of the rest of the property; but I can see no indication of any desire that a tenant for life, or other limited beneficiary, should keep wasting property *in specie*, so as to give him a more profitable enjoyment of it than those coming after him should have. The fact that the terms of years had only thirty and forty years to run, and that the ultimate devise of the capital might, in certain events, not come into full operation until the youngest child of Espine Ward attained the age of twenty-one years, shows that certain objects of the testatrix's bounty would be placed at grave disadvantage from the wasting of the leasehold property, if conversion did not take place.

I regard this as a case not so much of presumption of law as of the burden of proof, and I cannot find sufficient indication of

(1) 2 Beav. 31; 4 Myl. & Cr. 289.

Appeal. 1906. LYONS *v.* HARRIS.

intention that the property shall be enjoyed *in specie*, as distinct from its being all turned into permanent capital and enjoyed *en masse*, and, therefore, I am of opinion that *Howe* v. *Lord Dartmouth* (1) applies, and that the appeal must be allowed.

HOLMES, L.J.:—

In a case of this nature it must be a matter of guess-work what the testator or testatrix would have directed if the particular question under discussion before the Court had been brought to his or her attention at the time the will was made.

I see certain reasons in this case for thinking that in all probability, if the matter had been before the testatrix, she would have directed an immediate conversion. On the other hand, reasons might be suggested why she would have directed a postponement of the conversion until the death of the tenant for life. I have no right to form any opinion as between these two probabilities. It is important therefore to follow a rule of law if we have one; and the rule of law in *Howe* v. *Earl of Dartmouth* (1) is one which is clear and definite. *Prima facie*, in cases of this nature there ought to be a conversion; but if any intention can be gathered from the will (and in many cases a slight indication of intention is sufficient) that conversion is to be postponed, and that the property is to be enjoyed *in specie* during the lifetime of the tenant for life, that intention will prevail. I have carefully considered the provisions of this will, and I can find not the smallest evidence of such intention; in fact, the words used are the most general words that could be used in a gift of residue. [His Lordship referred to the will.]

If the rule be not applied in this case, I can hardly conceive any case in which it ought to be applied. It might as well be struck out as a rule of law altogether in favour of a rule that in every case, save where there is an actual direction for conversion, the property should be enjoyed *in specie*.

Solicitor for the appellant: *W. J. Shannon.*
Solicitor for the respondent: *W. Wallace Harris.*

R. ST. J. C.

(1) 7 Ves. 137.

M'FARLAND, TENANT; HAMILTON AND ROYDS, LANDLORDS (1).

Appeal.
1906.
Nov. 26, 27.

Landlord and tenant—Land Acts, 1881, 1887, 1896—*Non-agricultural holding—Buildings and shop in a village—No separation of holding.*

A holding, comprising 20A. 1R. 35P., held at a rent of £22 a-year, was situate near the village of Gortin, in the county of Tyrone. The house on the holding—originally a thatched cottage—was in the main street of the village.

The holding was sold in 1870 for £250 to J. M., who built a substantial house in place of the cottage, in which he carried on the business of a general shop, and to which at one time a license was attached. After the death of J. M., in 1881, the holding was sold for £425, and the present tenant built a second house on it in 1890, which was let at £8 a year, and was used for the post office and as a saddlery shop.

The Poor Law valuation of the holding was £36, of which £13 5*s.* was the valuation of the land, and £22 10*s.* of the buildings. The land was worked as an ordinary farm:—

Held, that the holding was not substantially agricultural or pastoral in its character.

APPEAL by the landlords, J. Cole Hamilton and Edmund Royds, from a decision of Judge FitzGerald, fixing a fair rent on a holding in the townland of Gortin, and county of Tyrone, on the ground that the holding was a "town park" or "accommodation land," or, in the alternative, that it was "not mainly agricultural or pastoral in its character." This last-mentioned ground was not argued at the hearing before Judge FitzGerald.

The holding consisted of 20A. 1R. 35P. statute measure, held at a rent of £22. The Poor Law valuation was £36, of which £13 5*s.* was on the land and £22 15*s.* on the buildings.

Prior to 1870 the holding belonged to a man named Samuel M'Farland (no relation of the present tenant), when it was sold in that year to John M'Farland, an uncle of the present tenant, for £250. At that time there was only a thatched cottage on it,

(1) Before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1906.

M'FARLAND, *Tenant;* HAMILTON AND ROYDS, *Landlords.*

one story high. John M'Farland built the present dwellinghouse, a slated building of two stories, in the main street of Gortin, in which he opened a grocer's shop, to which a publican's license was attached. He also built some of the offices. John M'Farland died in 1881, and after his death there were proceedings in Chancery to administer his assets. Thomas M'Farland, the father of the present tenant, purchased the holding in the administration suit for £425, and, in 1884, he made it over to his son, Robert M'Farland, the present tenant. The present tenant built a second slated house in 1890, which was sub-let at £8 a-year, and used as a post office and saddlery shop.

The buildings existing on the holding consisted of the slated dwellinghouse and shop, two and a-half stories high, value for £400; a range of slated offices, lofted, value for £100; a second range of slated offices, used as a stable, and largely used for putting up horses of farmers coming into Gortin markets, value for £100; a wooden-roofed shed, used as a store, value for £40; and a slated piggery, value for £10. The total value of the buildings was stated to be £850. The publican's license had dropped since 1902. Gortin is a village about eight miles north of Omagh, with a population of about 300. There was a regular market in the market-house up to four years before the hearing of the case, when the owners of the estate abolished it, and sold the market premises. The present tenant then set up a weekly market in the wooden shed, and he charged a penny per bag on the corn sold. The land of the holding was used as an agricultural farm in a six-course rotation.

In the Pink Schedule the Sub-Commission valued the land at £13 11*s.* 6*d.*, the buildings at £7 10*s.*, and the turbary outside the holding at £1 10*s.*, making a total of £22 11*s.* 6*d.* The larger portion, 18A. 3R. 20P., they valued at 14*s.* per acre, and two small portions at 8*s.* and 6*s.* per acre, respectively. On the other side they stated the capital value of the improvements to be—drains, £10; fences, £7 10*s.*; and buildings, £300; and from the rent they deducted for improvements, £8 7*s.* 6*d.*—viz. £7 10*s.* for buildings, and 17*s.* 6*d.* for drains and fences. The fair rent of the holding was fixed by the Sub-Commission on the 30th July, 1902, at £14 4*s.*

At the heading No. 8 in the Pink Schedule—

> "State any other matters in relation to the holding that have been taken into account in fixing the fair rent thereof"

—the Sub-Commission stated :—

> "The site of the buildings, which are extensive, and are situated in the main street of Gortin, and in which the tenant carries on the trade of publican, general store-keeper, &c., also the post office, has been considered in the acreable rent."

The landlord appealed, and the assessor of the Head Commission valued the land at £14 1*s.*; the buildings at £25 10*s.*, and the landlord's turf at £1 10*s.*, making a total of £41 1*s.* In estimating the value of the land, he valued the site of the houses, garden, and paddock at £2 16*s.* 3*d.*

On the other side, he valued the buildings at £850, the fences at £15, and the drains at £10. The deductions from the rent on account of the improvements were—for buildings, £25 10*s.*, and for fences and drains, £1 5*s.*, amounting altogether to £26 15*s.* He estimated the fair rent at £14 6*s.*

The Land Commission fixed the fair rent at £18. From that order the landlord appealed.

The Right Hon. J. H. Campbell, K.C., and *Percival C. Gaussen*, for the appellant.

D. S. Henry, K.C., and *F. N. Greer*, for the respondent.

SIR SAMUEL WALKER, C.:— Nov. 27.

We have considered this case during the hearing, and I am coerced to come to the conclusion that this is a case in which the tenancy is not substantially agricultural or pastoral in its character. If that is so, we are bound by the Act of 1896 to dismiss the claim, and that is the test I apply. Is the holding substantially agricultural? You may paraphrase that in various ways. Is it in substance agricultural? Is it in its main features agricultural? At first one is struck by the point urged by the tenants' counsel, that all the expenditure of converting this holding into a thing that was substantially non-agricultural was made by the tenant.

Appeal. 1906. M'FARLAND, *Tenant;* HAMILTON AND ROYDS, *Landlords.* Sir Samuel Walker, C.

I am reluctantly obliged to say that we cannot take that into consideration, because still the Act of 1896 stares us in the face, and in order to apply the section of that Act we must look at it as if there was a letting by the landlord in 1890, with all these buildings in existence, and see whether the Act of 1896 puts this holding out of the category of holdings on which a fair rent can be fixed. That is really the question that arises here. If this were the case put by Holmes, L.J., in *The Castleconnell Case* (1), and the tenant, instead of doing what he did, put three or four rows of villas upon the lands, there would be no question but that it was not substantially agricultural. Therefore, in every case it it is a question of degree and of fact. The history of this holding shows that by a considerable expenditure the tenant developed the holding into the condition in which it came before the Sub-Commission Court: that is the test we have to apply. This holding was bought in 1870 by Samuel M'Farland, who sold it to John M'Farland (not a relation, it is stated) for £250. The only buildings on the holding then were the dwellinghouse, the house used for a post office, and some small offices. John M'Farland rebuilt that house and slated it, and added a story to it, and fitted it up with the shop, which now appears in the photograph we have seen to be suitable for the carrying on of a considerable business, and would indicate that the tenant had departed considerably from an agricultural user of the house. He also built a range of slated offices, added a store, a wooden shed, a slated piggery, byres, and some labourers' cottages, some of which buildings would, no doubt, be agricultural in their character.

John M'Farland died, and there was an administration suit in 1882, in the course of which Thomas M'Farland, the father of the present tenant, bought the holding for £425, and he made it over to Robert. The only addition made since is by Robert M'Farland, the present tenant, who, in 1890, built the saddlery shop, in which the post office has now for several years been carried on, and which is sublet at £8 per annum, M'Farland paying the rates and taxes. Robert M'Farland obtained a license for the premises, which was in existence at the time of the hearing before the Sub-Commission;

(1) *Gloster* v. *Ryan*, [1899] 2 I. R. 174, 179.

but it dropped subsequently, and had ceased to exist when the case came before the Head Commission.

It appears that for several years a sort of market has been held in this wooden shed, and the tenant charges 1*d.* a sack for weighing sacks of corn. The tenant lives on the holding, and he has two drapery apprentices. The way the produce is used is that he sends the milk to a creamery, gets back the separated milk, and uses that: he uses portion of what is raised from the farm on the premises, and the surplus is sold. That evidence is of no value in the case; it is the way that most agricultural holdings are used—the tenant consumes what he requires, and sells the surplus.

Then we must look at the valuation. The valuation is £18 for the houses and offices, £1 10*s.* for the store, and £3 5*s.* for the post office; and on the lands the valuation is £13 5*s.* 10*d.* Under these circumstances, can we say that the holding is, within the words of the Act, substantially agricultural? I do not think that we can. I was greatly impressed with the contention, and anxious to adopt the conclusion, that as the improvements were made by the tenant, the Acts of 1896 should not be strictly applied; but there is no legal ground for that contention. We must still look at the holding just the same as if it were a letting made to the tenant in 1890 of the then subject-matter, and then apply the test created by the Act of 1896. I am therefore of opinion that the judgment of FitzGerald, J., should be reversed, and the fair rent notice dismissed. There will be no costs in the Court below, as the point was not raised until the hearing was nearly concluded; the landlord must have the costs of the appeal.

FITZGIBBON, L.J.:—

It is well to bear in mind that this holding contains 20½ acres, of which, in round numbers, 19 acres are agricultural land, used as such, the remaining 1½ acre is a long strip separated by a public road from the 19 acres, partly consisting of the bed of a stream, and running up at one end to the main street of Gortin. All the buildings which are now the principal subject of investigation, with the exception of one small cottage, stand on that strip.

It is clear on the face of the figures which they adopted,

Appeal. 1906.

M'FARLAND, *Tenant;* HAMILTON AND ROYDS, *Landlords.*

Fitz Gibbon, L.J.

that both the Sub-Commission and the Assessor of the Head Commission attempted to get over the fact that the holding consisted of two parts, entirely different in character, and nothing could more plainly show the impossibility of treating the entire holding as substantially agricultural than the way in which the valuers dealt with the figures. If the "pink paper" was not before me, I should have found it hard to believe that such a method of ascertaining a "fair rent" could have been adopted as that which the Sub-Commission followed. They valued the land partly at 14*s.*, partly at 8*s.*, and partly at 6*s.* an acre. The portion valued at 14*s.* contains 18 of the 19 acres *on which the buildings are not situated.* This note is appended—

> "The site of the buildings, which are extensive, and are situate in the main street of Gortin, and in which the tenant carries on the trade of publican, general store-keeper, &c., also the post office, *has been considered in the acreable rent.*"

But the acreable rent of the site of the buildings is either 8*s.* or 6*s.*, and the Sub-Commission valued the buildings at £300; that sum was raised to £850—that is to say, it was nearly trebled—by the assessor who valued the place for the Head Commission. It may well be asked—What would the Sub-Commissioners have fixed as the "acreable rent" of this part of the holding, if it had not been considered as a building site? But how did they deal with the rent of 6*s.* or 8*s.* which they put upon it? They found that the tenant's improvements, including all the buildings, were worth £8 7*s.* 6*d.* a-year; they credited the holding with £7 10*s.* for buildings, and £1 10*s.* for the value of landlord's turbary, but they wrote off the £8 7*s.* 6*d.* against that and the acreable rent, and thus brought out £14 4*s.* as the fair rent of the entire holding, including the consideration which they say they gave to the site of the buildings "in the acreable rent." Thus, they wholly ignored—so far as money was concerned—any right of the landlord to any rent beyond 6*s.* or 8*s.* an acre by reason of the user and value of the non-agricultural portion which was the site of the extensive and important buildings. Of course that procedure received no countenance from the assessor or from the Land Commission. The value of the buildings was raised to

£850, and their annual value was raised from £8 7*s.* 6*d.* to £25 10*s.*; adding drains and fences, the total valuation of the tenant's improvements became £26 15*s.* instead of £9, and the arcreable rent of the garden and paddock which was 8*s.* or 6*s.* according to the Sub-Commission, was raised to 30*s.* an acre, and, *besides that*, an additional value of £3 14*s.* was put on the sites of the post office and saddlery shop, the shop in the dwelling-house, and the market shed. In effect, the assessor, on the appeal, put thirteen or fourteen times the value upon the non-agricultural portion of the holding which the Sub-Commission had fixed, and it appears to me that, though this was legally right if a fair rent was to be assessed at all upon such property, it plainly showed that the only way in which the holding could be dealt with was by separating it into two parts—one agricultural and the other not, and valuing each portion upon a different principle. All the additional value which was put on by the assessor, was in the nature of non-agricultural rent, put upon land of which the user and character were neither agricultural nor pastoral, and to which, therefore, the Land Acts did not apply. That was the true position of this holding, both at the passing of the Act of 1896 and at the date of the originating notice. Originally, before 1870, the holding was homogeneous and agricultural in character. The 1½ acres were then merely a strip running up to the main street of Gortin, on which the tenant's dwelling and offices stood. Afterwards the tenant, living in Gortin, got the post office, and opened a shop. Even before 1882, the non-agricultural user had become important. The holding, in its agricultural condition, was sold for £250 in 1870. In 1882, after the principal improvements and extensions had been made, it was sold for £425.

We ought not to leave out of consideration that from 1881 down to the service of the present originating notice the occupier never applied to fix a rent under the Land Acts. It is said that he got a reduction of rent, but certainly not such a reduction as he would have been entitled to if his rent was an agricultural one, or if he was entitled to fix a fair rent by agreement under the Land Acts. That he did not apply to do so is strong evidence that he knew that the holding was not within those Acts.

Under the Act of 1896, if there is a substantial part of a

Appeal. 1906. M'FARLAND, *Tenant;* HAMILTON AND ROYDS, *Landlords.* Fitz Gibbon, L.J.

holding on each side of the line, a fair rent cannot be fixed on the agricultural part, unless the holding can be divided. If it has not got one common agricultural or pastoral character as a whole, the only remedy is that which is provided by the Act of 1896, section 5, viz., to separate the holding into two parts—one agricultural and the other non-agricultural. That cannot be done in this case, because it is a physical impossibility to divide this holding into two parts. Even the dwelling-house is partly agricultural and partly not, for the upper floor is the tenant's dwelling, and the ground floor is the principal shop in the town of Gortin. The tenant himself has ceased to be wholly or mainly agricultural or pastoral, and has now become substantially commercial. As section 5 cannot be applied, it follows that the Land Acts, as they exist at present, do not apply. We need not consider whether it is a case for a "Town Tenants Bill." The case turns on a question of fact, but that question involves jurisdiction, and, in my opinion, there is none here to fix a fair rent, and the originating notice must be dismissed.

HOLMES, L.J.:—

That there was no application to fix a fair rent of this holding for nearly twenty years after the passing of the Act of 1881 can be accounted for by the circumstance that such an application would not have been advised by any lawyer before the Act of 1896. According to the decisions under the earlier statute, this holding could not have been regarded as agricultural, and what the tenant must now rely on is the introduction, in the 5th section of the later Act, of the word "substantially" before the words "agricultural and pastoral." "Substantially" may be paraphrased or explained in different ways; but I think it carries its meaning with it. I would be satisfied to give it the same construction as "mainly," which occurs in the definition section of the Act of 1881. Now this holding was not mainly agricultural and pastoral at the date of the application in 1896. It was so when we first hear of it. It then consisted of 21 acres of indifferent land, valued at £13 a year, having as the dwelling-house thereon a thatched cottage, the valuation of which would almost certainly be under £3. The land abutted on the street of Gortin,

Appeal. 1906.

M'Farland, *Tenant;* Hamilton and Royds, *Landlords.*

Holmes, L.J.

a small country town, in which there were held a weekly market and a monthly fair. This circumstance induced the tenant to make a change in the character of the holding by utilizing part of it for trade purposes. He built a new dwelling-house and a large shop facing the street, and he has since carried on a good business therein. He has also erected other buildings on the premises, and the Lord Chancellor has enumerated the purposes for which they have been used. At present, of an aggregate valuation of about £36, nearly £23 represents the buildings, of which much the greater part is not used for agricultural purposes. I am, therefore, of opinion that the holding is not within the Land Acts, and that the appeal must be allowed.

Solicitor for the landlord: *R. S. Holland.*
Solicitors for the tenant: *Dickie & Carson.*

R. D. M.

Ross, J. 1907. Jan. 14.

In the MATTER of the ESTATE of JOHN STINSON and THOMAS STINSON, Owners; MARGARET M'MUNN, Petitioner; continued in the Name of WILLIAM ORMSBY, as Owner; ELIZA ORMSBY, as Petitioner.

Practice—Land Judge's Court—Court letting of whole estate—Dismissal of petition as to portion of estate.

Where a Court letting had, with the acquiescence of all parties, been made to a tenant for seven years, pending the matter, from 28th March, 1905, of the whole estate, which consisted of two portions in separate ownership, the Court, in 1907, refused, *in invitum* the Court tenant, to allow the petition to be dismissed as regards one of the portions.

Application to dismiss the petition out of Court as to portion of the lands comprised in the order for sale.

The petition was filed for the purpose of raising a perpetual annuity of £21 Irish, together with the arrears due on foot thereof, payable out of the lands of Ballymeeny, in the county of Sligo, containing 108 acres, held in fee simple (1). John Stinson was owner of 54a. 1r. 20p. of the said lands, and Thomas Stinson was owner

(1) See 29 L. R. Ir. 490.

Ross, J. 1907.

In re STINSON'S ESTATE.

of the remaining portion of the lands, comprising 54 acres. By conveyance, dated 18th September, 1893, John Stinson conveyed his portion of the lands to William Ormsby, who also obtained a judgment mortgage for £237 and costs over Thomas Stinson's portion. In addition, and in priority to this mortgage, a judgment mortgage for £83 and costs had been registered by Robert Bourke over Thomas Stinson's portion. The only incumbrance affecting John Stinson's portion of the lands was the annuity of £21, and arrears thereof, now vested in Eliza Ormsby and others, and also a Board of Works loan of £75.

The entire lands had been let by the receiver, under Court letting, with the acquiescence of all parties interested, to Thomas Broder, who obtained a new letting for seven years pending the matter, from 28th March, 1905, at £63 yearly.

The applicants, William and Eliza Ormsby, now applied to the Court for an order dismissing the petition, as regards 54A. 1R. 20P., the portion of the lands conveyed to William Ormsby by John Stinson.

The application was opposed by Thomas Broder, the Court tenant.

H. R. Poole, for the applicants.

Timothy Sullivan, for Thomas Broder, was not called upon.

Ross, J. :—

The letting to the Court tenant was a contract with the tenant by all the parties, including the owners, that the letting should continue for seven years from 1905, pending the matter. The matter here is the two estates of John and Thomas Stinson. The owner of one estate having, by his acquiescence, been a party to the contract of letting, cannot now terminate the contract in part by having the petition dismissed as to his estate. Such an act would be a breach of contract on his part. The application must be refused, with costs.

Solicitors for the applicants: *Fenton & Lyons.*

Solicitors for Thomas Broder: *Longfield, Kelly, & Armstrong.*

D. M. S.

IN THE MATTER OF THE ESTATE OF FRANCES MARY POWER.

Wylie, J.
1906.
Dec. 11, 18.

Marriage settlement—Agreement to settle after-acquired property "not hereinbefore settled"—Bonus—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Irish Land Act*, 1904 (4 *Edw.* 7, *c.* 34), *s.* 3.

By marriage settlement certain funds, consisting of Government stock, were (*inter alia*) settled, upon trust to pay the income to F. M. P. (the wife) for life, then to J. P. (the husband) for life, with limitations over. The settlement contained a power to the trustees to invest the trust funds in the purchase of land, and to sell again and re-invest, the rents and profits to be applied in the same manner as the income from the trust funds; and also contained this clause:—"It is hereby agreed and declared that the real and personal property (if any) *not hereinbefore settled*, to which the said F. M. P. at the time of the said intended marriage, or she, or the said J. P. in her right, at any time during her now intended coverture, shall be or become entitled, whether in possession, reversion, or otherwise" (except certain specified articles of jewellery, &c.), "shall . . . be assured and transferred . . . to the trustees, . . . to be held upon the same trusts as the settled funds."

In pursuance of the power vested in them, the trustees sold portion of the settled funds, and invested the proceeds in the purchase of certain lands, which were subsequently sold by F. M. P. under the Irish Land Act, 1903. On a question arising as to whether the percentage payable under section 48 of the said Act and section 3 of the Irish Land Act, 1904, was captured by the above clause in the settlement:—

Held, that the percentage was payable to F. M. P., and was not captured by the clause in question.

QUESTION arising on allocation as to whether a clause in the vendor's marriage settlement, whereby it was agreed and declared that all real and personal property (if any) "not hereinbefore settled" to which the vendor might become entitled during coverture, should be brought into settlement, captured the percentage payable in pursuance of the provisions of sect. 48 of the Irish Land Act, 1903, and sect. 3 of the Irish Land Act, 1904? The facts appear sufficiently from the judgment.

H. Morgan Byrne, for E. Lloyd and another, mortgagees of

Wylie, J. 1906. *In re* POWER'S ESTATE.

the percentage, cited *In re Ely's Estate* (1), *In re Lady Annaly's Estate* (2), *In re Lady Annaly's Trusts* (3), and *Churchill* v. *Denny* (4).

G. F. Brunskill, for the trustees of the settlement.

Dec. 18.

WYLIE, J.:—

A nice and rather difficult question has been raised in this case as to who is entitled to receive the bonus. It is admitted that the vendor, who is tenant for life of the lands sold, is entitled to the bonus, unless it is captured by a covenant in her marriage settlement. At the time of her marriage the vendor was entitled, under her father's will, to his residuary estate, which consisted principally of a sum of £11,755 of Government New Three per cent. stock, and by her marriage settlement, dated the 2nd June, 1879, that sum, together with all other property to which she was entitled under her father's will, was vested in trustees, upon trust to pay the income to the vendor for life, then to her husband for life, and then to the issue of the marriage as therein provided. The settlement contained a power to the trustees to invest the trust funds in the purchase of land, and to sell again and reinvest, the rents and profits to be applied in the same manner as the income from the trust funds. The settlement also contained this clause: "It is hereby agreed and declared that all real and personal property (if any) *not hereinbefore settled* to which the said Frances Mary Power, at the time of the said intended marriage, or she, or the said John Power in her right, at any time during her now intended coverture, shall be or become entitled, whether in possession, reversion, or otherwise" (except certain specified articles of jewellery, &c.), "shall . . . be assured and transferred . . . to the trustees . . . to be held upon the same trusts as the settled funds." The trustees subsequently, pursuant to the power in the settlement, sold part of the settled funds, and invested the proceeds in the purchase of lands. These lands have been sold in this matter by Frances Mary Power, as tenant for life, and there can be no

(1) [1904] 1 I. R. 66.
(2) 53 W. R. 150.
(3) 5 New Ir. Jur. 118.
(4) L. R. 20 Eq. 534.

question that, under the Land Purchase Acts, 1903 and 1904, she is now entitled to receive the bonus for her own use, free and discharged from the trusts of the settlement, unless it is captured by the clause in the settlement above referred to.

The nature and incidents of the bonus have been discussed at length in several cases, and decisions given with reference to them.

In *Ely's Estate* (1) the question arose in December, 1903, upon the construction of section 48 of the Act of 1903, whether the bonus was payable to the vendor, who was tenant for life, for his own use, or to the trustees of the settlement? In dealing with this question, Ross, J., says: "It is quite clear from numerous sections that the purchase-money is distinct from the bonus. In certain cases only it is expressly directed to be added to the purchase-money, and not to be paid to the vendor; in all other cases it is treated as having an independent existence"; and then, further on, after discussing what the bonus is and who may be vendor, he says: "With respect to the bonus, I am now of opinion, having regard to its nature and the circumstances under which it is acquired, that a Court of Equity ought not to allow the tenant for life to appropriate this by-product of the sale to his own use: it must fasten a trust upon it in his hands, and compel him to hold it for all other parties who take under the settlement, as well as for himself"; and further he says: "The result of the whole matter is, that I refuse the motion, on the ground that the bonus, when received by the owner in this matter, would be subject to the trusts of the settlement." This decision seems to me to amount to this, that whatever the nature of the bonus may be, though it has an independent existence distinct from the purchase-money, yet it is so connected with the settled estate as a by-product of the sale, that it is captured by and subject to the trusts of the settlement, and that entirely apart from, and without, any covenant in the settlement to settle other existing or after-acquired property.

The same question arose again in the case of *Lady Annaly's Trusts* (2), before Kekewich, J., *after* the Act of 1904 came into

(1) [1904] 1 I. R. 66.
(2) 53 W. R. 150.

Wylie, J. 1906.

In re Power's Estate.

force, under a settlement containing a covenant to the effect that if Lady Annaly should, at any time during the coverture, become entitled, in any manner, to any estate or interest in any real or personal property besides the property thereby settled, and *besides the real estate settled by an indenture of even date*, she should bring the same into settlement. The learned Judge was of opinion that the bonus would be captured by the covenant unless it was within the exception "besides the real estate settled by an indenture of even date," which was the land sold, and in respect of which the bonus was payable, and he held that the bonus was an interest in the real estate sold, and was within the exception, and not captured by the covenant, but was payable to the vendor as tenant for life for her own use.

When the same case came on for allocation, the present Master of the Rolls, while sitting as Judicial Commissioner, when referring to and acting upon the decision of Kekewich, J., is reported (1) to have said: "If this question arises in any other estate, though as a matter of comity I might have to follow the decision of Mr. Justice Kekewich, still, before doing so, I should deem it my duty to carefully consider the matter." I regret that I have not the benefit of the full considered judgment of the Master of the Rolls to guide me in this case; and I am not aware whether his doubt as to the correctness of the decision of Mr. Justice Kekewich was based upon the nature and character of the bonus, or the form and effect of the covenant.

I am unable to see any substantial or material difference between the covenant in that case and the one we have to deal with in the present case. Mr. Justice Ross, in *Ely's Estate* (2), and Mr. Justice Kekewich, in *Annaly's Estate* (3), both held that the bonus was an estate or interest in the settled land, and was, apart from the Act of 1904, captured by and subject to the trusts of the settled land. If this be so, it must be outside any covenant to bring into settlement *other* existing or after-acquired property, and cannot be said to be property "not hereinbefore settled"—words which I think govern the entire clause in the settlement, both as to existing and after-acquired property.

(1) 5 New Ir. Jur. at p. 118. (2) [1904] 1 I. R. 66. (3) 53 W. R. 150.

In *Churchill* v. *Denny* (1), where the defendant was, at the time of his marriage, in receipt of half-pay, which he subsequently commuted under 34 & 35 Vict. c. 36 for £2,175, and by his marriage settlement had agreed that if he then was or should, during coverture, become entitled to any real or personal property of the value of £100, or upwards, for any estate or interest whatever, he would bring it into settlement, Sir George Jessel, M.R., held that the commutation money was not bound by the settlement, and in giving judgment, says (2): "Then it is said that, as under an Act of Parliament he had a right to commute the half-pay, that is to sell it, and receive a certain sum of money from the Treasury, he thus became entitled to a certain sum of money, which of course was personal property after the date of the settlement. That depends on the meaning of the words 'shall become entitled.' Now, to become entitled means to acquire a title; as Vice-Chancellor Kindersley puts it in *Wilton* v. *Colvin* (3), 'What is meant by becoming entitled? . . . Does it not always mean acquiring title? When you find the words "shall become entitled," you are always referring to some future interest, to the acquisition of some future title.' If a man has something to sell, and he sells it, and gets the purchase-money, he does not acquire a future title, for it is his title to his property which enables him to get the money for it, or to vary the investment, and varying an investment is not acquiring any title. If a man has a sum of Consols, and sells it and invests the proceeds in £3 per cent. Reduced Annuities, could it be reasonably argued that he became entitled to them within the meaning of such a covenant as this? . . . I cannot distinguish it from the case of a man selling Consols and purchasing *Blackacre* with the proceeds."

Now, all that seems to me to apply to this case. The trustees of the settlement sell the Government Stock, and invest the proceeds in land, and the tenant for life, first of the stock and then of the land, sells the lands under the Land Purchase Acts, and gets for it what is technically called purchase-money, and also a percentage or bonus. It is the same title that gives her a right to both. She does not acquire a future title to the bonus,

(1) L. R. 20 Eq. 534. (2) *Ibid.* 536. (3) 2 Drew. 617, 624.

Wylie, J. 1906.

In re POWER'S ESTATE.

such as would leave it free from the trusts of the settlement, which bound her entire interest in the trust property at the date of the settlement, and make it subject to the covenant to settle after-acquired property. The view of Mr. Justice Ross, adopted and approved by Mr. Justice Kekewich, was that the bonus, under section 48 of the Act of 1903, was subject to the trusts affecting the purchase-money. This view appears to me to have been also adopted by the Legislature, and embodied in section 2 of the Act of 1904, subject, however, to the exception expressly enacted by section 3 (1), that where the vendor is a tenant for life, the bonus shall be retained by him as his own proper moneys, for his own use and benefit, free and discharged from all claims upon the lands sold or the purchase-money thereof, and from any trust affecting the same. In the most recent case dealing with the bonus, *In re Carroll's Estate* (1), Mr. Justice Ross held that the tenant for life was entitled to the bonus absolutely, though there was a Board of Works charge, which the purchase-money was insufficient to pay. On all the above grounds, therefore, I am of opinion, and so decide, that the bonus in this case is payable to the tenant for life, and is not captured by the clause in the settlement.

Solicitor for the mortgagees: *E. Lloyd.*

Solicitors for the trustees of the settlement: *Kennedy, Sons, & Lloyd.*

J. E. W.

(1) [1906] 2 I. R. 661.

IN RE GREER, DECEASED; GREER *v.* GREER.

(1902. No. 140.)

Barton, J.
1906.
July 25.

Priorities—Prior legal mortgage—Subsequent equitable mortgage by deposit of title-deeds—Fraud or gross negligence—Burden of proof—Registration—Non-registrable security.

In an administration suit there appeared on the allocation schedule an item due for principal and interest to a legal mortgagee, under a registered legal mortgage, dated 1884; and after it an item due to a Banking Company, on foot of an equitable mortgage, by deposit of title-deeds made by the original mortgagor in 1901. The estate was insolvent, and there was not sufficient money in Court to pay both mortgages in full. Evidence was given by the Bank manager that the mortgagor, when depositing the deeds in 1901, represented that the estate was unencumbered. There was no evidence or circumstance pointing to any fraud or negligence on the part of the prior legal mortgagee, or connecting him with the fraud of the mortgagor; and the legal mortgage was otherwise unimpeached. Interest had been regularly paid on it since 1884. The legal mortgagee was dead, and no explanation was available as to the circumstances under which the title-deeds had been in the possession of the mortgagor at the date of the second mortgage. No application was made to the Court for an inquiry at Chambers; and it was not suggested that any relevant evidence was obtainable, or was being withheld by the successor in title of the legal mortgagee:—

Held, that the mere fact of non-possession of the deeds by the prior legal mortgagee, and possession of them by the subsequent equitable mortgagee, where there was no evidence or circumstance pointing to fraud or negligence on the part of the prior legal mortgagee, or connecting him with the fraud of the mortgagor, was not, under the circumstances of the case, sufficient to displace the priority of the prior legal mortgagee.

Held, further, that the registration of the prior legal mortgage did not, *per se*, affect the priorities, because the equitable mortgage was a non-registrable security.

Quære: Whether the fact that the prior mortgagee had duly registered his mortgage could have any relevance upon the issues of fraud and negligence in connexion with the non-possession of title-deeds.

ALLOCATION.

On the allocation schedule there appeared an item of £261 10*s.* 6*d.*, the amount due for principal and interest on foot of a legal mortgage, dated 11th January, 1884, made by Thomas

Barton, J. 1906. GREER v. GREER.

Fergus Greer to William Barcroft, and after it an item of £149 18*s.* 11*d.*, the amount due on foot of an equitable mortgage by deposit of title-deeds, made on 27th March, 1901, by the said Thomas Fergus Greer to the Belfast Banking Company, Limited, Dungannon. The estate was insolvent, and the claim of the Bank, if postponed to that of the legal mortgagee, would not be fully met. The legal mortgage to Mr. Barcroft had been duly registered in the Registry of Deeds, and interest had been regularly paid on it, but the Bank had no notice of it at the date of the equitable deposit, or when making their advances. The Bank now applied to have the allocation schedule amended by giving their equitable deposit priority over the legal mortgage. The deeds deposited were two fee-farm grants, both dated 5th August, 1868, and made to Thomas Fergus Greer; and Mr. Greer, shortly before depositing them with the Bank, informed Mr. Henry Robinson, manager of the Bank's Dungannon branch, that the estate to which the deeds related was unincumbered. There was no evidence available as to the circumstances under which the deeds came to be in the possession of the mortgagor. There was no evidence to show whether they had ever been in the possession of the first mortgagee; or, if so, under what circumstances they had left his possession. There was no suggestion that any evidence was obtainable or was being withheld. The prior legal mortgagee was dead. The prior legal mortgage had been subsisting for more than twenty years, with interest regularly paid on it. No application was made to the Court for an inquiry at Chambers.

Chaytor, K.C., for the Belfast Banking Company :—

There has been gross negligence on the part of the mortgagee, Mr. Barcroft, in permitting the mortgagor to retain the title-deeds. By his negligence he has enabled the fraud to be committed, and he should, for that reason, be postponed to those who advanced money on the security of the title-deeds : Kerr on Fraud, 3rd ed., p. 120; *Oliver* v. *Hinton* (1); *Clarke* v. *Palmer* (2); *Lloyd's Banking Company* v. *Jones* (3); *Bernard* v. *Drought* (4); *Burke's Estate* (5); *Roche's Estate* (6).

(1) [1899] 2 Ch. 264.
(2) 21 Ch. D. 124.
(3) 29 Ch. D. 221.
(4) 1 Molloy, 38.
(5) 9 L. R. Ir. 24.
(6) 25 L. R. Ir. 284.

Samuel L. Brown, K.C., for the personal representative of Mr. Barcroft, the legal mortgagee:—

The authorities show that in order to displace the prior mortgagee there must be fraud or gross negligence. The negligence, if any, has been not on the part of Mr. Barcroft, but on the part of the Bank in not making search in the Registry of Deeds, where the mortgage was registered. The omission by Mr. Barcroft to obtain or retain possession of the deeds was in itself not fraud or gross negligence so as to deprive him of his priority, and there is no evidence that he was responsible for the deception practised on the Bank. The fee-farm grants were not title-deeds at all, being on the face of them stated to be in lieu of leases for lives renewable for ever. They conferred no title on the grantee which he had not before the grant. The Bank should therefore have investigated Mr. Greer's title, and should have obtained possession of the other documents of title before making advances. But not having done so, their equity was no better than Mr. Barcroft's and the legal mortgage should, therefore, not be postponed. Registration is a material fact when fraud is imputed: *per* Christian, L.J., and Lords Cairns, Hatherley, and Selborne in *Agra Bank* v. *Barry* (1).

BARTON, J.:—

The contest is between a prior legal mortgagee and a subsequent equitable mortgagee by deposit of title-deeds. It arises upon an allocation of moneys in Court, so that there is no question of compelling the second mortgagee to part with the possession of title-deeds, and I have not been asked to consider any question of that kind. I have only to declare priorities. The peculiarity of the case is that no explanation is available of the circumstances under which the deeds came to be in the possession of the mortgagor at the date of the second mortgage. There is no evidence or circumstance pointing to any fraud or negligence on the part of the prior legal mortgagee, or connecting him with the fraud of the mortgagor. The legal mortgage, save for the mere non-possession of the deeds, is unimpeached. It has been a subsisting registered mortgage for more than twenty years, with interest on foot of it

(1) I. R. 6 Eq. 128; L. R. 7 H. L. 135.

Barton, J. 1906. GREER v. GREER.

regularly paid. The legal mortgagee is dead; and there is no suggestion, or ground for suggesting, that any relevant evidence is obtainable, or is being withheld by his successor in title.

The question is mainly one of burden of proof, and the argument for the Bank seems to me to amount to what Buller, J., said in *Goodtitle* v. *Morgan* (1):—"It is an established rule of Equity," he said, at p. 762, "that a second mortgagee who has the title-deeds, without notice of any prior incumbrance, shall be preferred, because if a mortgagee lends money upon mortgage without taking the title-deeds, he enables the mortgagor to commit a fraud." Lord Eldon, however, in *Evans* v. *Bicknell* (2), after quoting this passage said, at p. 190:—"I conceive it is now very well settled that the doctrine of Mr. Justice Buller, that I have just stated, is founded upon error. It would be idle waste of time to go through all the cases. . . . The doctrine at last is, that the mere circumstance of parting with the title-deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention, is not of itself sufficient to postpone the first mortgagee." The principle laid down by Lord Eldon in *Evans* v. *Bicknell* (2) was reaffirmed by him in *Martinez* v. *Cooper* (3), adopted by the House of Lords in *Colyer* v. *Finch* (4), and has been applied in many other cases. In *Colyer* v. *Finch* (4) Lord Cranworth said, at p. 928:—"The rule on this subject is well settled. A first mortgagee, having the legal title, is not to be postponed to a subsequent purchaser or mortgagee merely because he has not possessed himself of the title-deeds. In order to deprive the first mortgagee of his legal priority, *the party claiming by title subsequent must satisfy the Court* that the first mortgagee has been guilty either of fraud or gross negligence, but for which he could have had the possession of the deeds." In *Farrow* v. *Rees* (5) Lord Langdale, speaking of an unexplained omission to get or keep title-deeds, said, at p. 21:—"I am of opinion that the omission is not of itself sufficient to invalidate the mortgage, and for that I believe there is ample authority." *Allen* v.

(1) 1 T. R. 755, 762.
(2) 6 Ves. 174.
(3) 2 Russ. 198.
(4) 5 H. L. Cas. 905.
(5) 4 Beav. 18.

Knight (1), decided by Wigram, V.-C., and affirmed by Lord Cottenham, C. (2), was to the same effect; but I pass it by, because it was a contest between a prior equitable mortgage and subsequent equitable incumbrancers who had acquired the legal estate. I prefer to keep to cases where, as here, it was sought to displace a prior legal mortgagee. To that class belonged *Carter* v. *Carter* (3), a case which was afterwards disapproved in *Pilcher* v. *Rawlins* (4) on another point, but not on this question of burden of proof. In that case, Lord Hatherley, when Vice-Chancellor, had to consider this question of burden of proof upon further consideration of the Chief Clerk's certificate in an administration action, which makes it very like this case. He said, at p. 646:—"In reference to this point, I may take it as conclusively settled that, in order to postpone any party to a cause in respect of a prior mortgage or incumbrance, the onus is on the party claiming of showing not merely that he has got the title-deeds—of course, that he can easily show—but that he has got them through gross negligence on the part of the person he seeks to postpone." He went on to say that where non-inquiry after the deeds was relied on, it might be "extracted by examination or otherwise," but "the Court would not presume that no inquiry was made."

I find nothing to the contrary in the cases which have been cited for the Bank. *Bernard* v. *Drought* (5) was a case of a solicitor's lien. In *The Northern Counties Fire Insurance Co.* v. *Whipp* (6), Fry, L.J., analysed the kinds of conduct on the part of a legal mortgagee, in relation to title-deeds, which would suffice, and the kinds of conduct which would not suffice, to postpone him. But in the present case there is no evidence of any conduct. Fry, L.J., was careful to say that mere carelessness would not postpone the prior legal mortgagee. He said (at p. 494) that there was on the evidence in that case "great carelessness," but held it was not enough to invalidate the prior legal mortgage. In *Clarke* v. *Palmer* (7) (the somewhat complicated facts of which were afterwards discussed, and explained, by North, J., in

(1) 5 Hare, 272.
(2) 11 Jur. 572.
(3) 3 K. & J. 617.
(4) L. R. 7 Ch. 259.
(5) 1 Molloy, 38.
(6) 26 Ch. D. 482.
(7) 21 Ch. D. 124.

Barton, J. 1906.

GREER v. GREER.

Manners v. *Mew* (1)), Hall, V.-C., said (at p. 126) that he thought that "upon the evidence, the deeds were left, *and improperly left*, by the mortgagee in the possession of the mortgagor." There is no evidence to that effect in this case. In *Lloyd's Banking Co.* v. *Jones* (2) no inquiry was made about the deeds. That would be quite enough. The inference of fraud, or gross negligence, may be drawn from slight evidence; but not from none. Non-inquiry, according to Lord Hatherley, should be proved by the second mortgagee, and should not be presumed by the Court. The only other case cited for the Bank was *Oliver* v. *Hinton* (3); but in that case there was no question of displacing a prior legal mortgagee. The action was brought by an equitable mortgagee against a subsequent purchaser, who claimed to be a *bona fide* purchaser for value without notice, and, as such, I suppose had, as part of his case, to explain all the circumstances under which he acquired his title.

I have refrained from referring to cases of contests between two equitable mortgagees. In a contest between two equities priority of time affects the balance only when equities are equal; and non-possession of title-deeds may render equities unequal, and in that way, if unexplained, may affect priorities. I disclaim any superstitious reverence for a legal estate. But a legal mortgage, with its legal as well as equitable remedies, gives a completer title than an equitable mortgage; and a prior legal mortgagee, to whom no notice of any competing mortgage can be imputed, starts with a certain advantage in any Court. The authorities seem to show that before and even since the Judicature Acts, Equity will not displace a prior legal mortgagee without evidence from which fraud, or gross negligence, may be inferred; and will exercise a more unfettered discretion in allotting priorities according to merits, where it has to disturb no rights or remedies, save those of its own creation. I may point out that Kay, J.'s, opinion, in *Taylor* v. *Russell* (4), which was to the effect that the amount of negligence necessary to postpone a first mortgagee is the same whether his mortgage is legal or equitable,

(1) 29 Ch. D. 725.
(2) *Ibid.* 22.
(3) [1899] 2 Ch. 264.
(4) [1891] 1 Ch. 8, 17.

was doubted in the House of Lords by Lord Macnaghten (1), and by Stirling, L.J., in *Taylor* v. *London and County Banking Co.* (2); and the opposite opinion has been expressed by Cotton, L.J., in *National Provincial Bank of England* v. *Jackson* (3), and North, J., in *Farrand* v. *Yorkshire Banking Co.* (4). I think it better not to trench on these somewhat unsettled questions as between equitable mortgagees. I have to deal here with a case in which it is sought to displace a prior legal mortgagee; and I rest my opinion upon none but cases of that kind.

The good old principle that "whenever one of two innocent persons must suffer by the act of a third, he who has enabled the third person to occasion the loss must sustain it," which was referred to in the course of the argument, has recently run the gauntlet of some judicial criticism in *Farquharson, Brothers, & Co.* v. *King & Co.* (5). In that case A. L. Smith, L.J. (at p. 708), and Vaughan Williams, L.J. (at p. 712), in the Court of Appeal, and Lord Halsbury (at p. 332), and Lord Lindley (at p. 342), in the House of Lords, expressed the opinion that it requires to be read and applied subject to some qualification. A. L. Smith, L.J., said: "The act which is relied upon as having enabled the third party to occasion the loss must, no doubt, be an act so far connected with the fraud which has caused the loss that it may reasonably be looked upon as bringing about that fraud" (6). Vaughan Williams, L.J., suggested several qualifications, *e.g.* that the conduct relied on should be "the effective, or proximate, cause of the loss" (7). Lord Lindley expressed the opinion that unless the word "enabled" is read in a qualified sense, this doctrine about the two innocent persons is "far too wide"; and he added that, as far as he knew, "the doctrine has never been judicially applied where nothing had been done by one of the innocent parties which has, in fact, misled the other" (8).

It is admitted that the Bank's equitable mortgage was not

(1) [1892] A. C. at p. 262.
(2) [1901] 2 Ch. 231, at p. 260.
(3) 33 Ch. D. 1, at p. 13.
(4) 40 Ch. D. 182, at p. 189.
(5) [1901] 2 K. B. 697; [1902] A. C. 325.
(6) [1901] 2 K. B. at p. 708.
(7) *Ibid.* 712.
(8) [1902] A. C. at p. 342.

Barton, J. 1906.

GREER v. GREER.

capable of being registered under the Irish Registry Act; and it was not contended that the registration of the legal mortgage *per se* affected the question of priorities as against the Bank's non-registrable security, or amounted to constructive notice to the Bank, or cast upon the Bank any duty to search the register. But it was contended that the fact that the legal mortgagee duly registered his mortgage might be material from another point of view—namely, upon the question of fraud or gross negligence towards subsequent incumbrancers, which is the ground upon which it is sought to displace this prior mortgagee. Mr. Brown referred to observations of Christian, L.J., and Lords Cairns, Hatherley, and Selborne, in *Agra Bank* v. *Barry* (1), to the effect that, in a register country like Ireland, registration may be material with regard to the question of fraud or negligence in relation to getting or keeping title-deeds. In that case both mortgages were registrable, and the legal mortgage was not, as here, the prior mortgage, but was the subsequent one; so that the question was concerned with negligence as amounting to constructive notice of a past incumbrance, rather than as enabling a subsequent incumbrancer to be defrauded. But, quite irrespective of the strong observations which are to be found in that case, Mr. Brown contended, with much persuasiveness, that the fact that a legal mortgagee duly registered his mortgage is a circumstance tending to negative rather than to support the charge of fraud or negligence towards a subsequent incumbrancer. I do not, however, find it necessary to express an opinion whether, upon the issues of fraud or negligence in connexion with title-deeds, there is any relevance in the circumstance that the prior mortgage had been registered. There seemed to be some force in the observation that if this prior legal mortgage had been a pocket instrument, unregistered, and not acted upon, the second mortgagee might be in a better position to contend that the circumstances raised a *prima facie* case against the first mortgagee of fraud or gross negligence, and cast upon him the burden of explaining the non-possession of title-deeds.

I recognize the difficulty which the Banking Company have in proving their case; but Lord Hatherley said that it may have to be

(1) I. R. 6 Eq. at p. 162; L. R. 7 H. L. at pp. 148, 149, 155, 157.

extracted by examination or otherwise. No application has been made to me for an inquiry at Chambers to ascertain how the deeds came into the possession of the mortgagor at the date of the second mortgage, or for the aid of the machinery of the Court by discovery and examination of witnesses. I am of opinion that, upon the materials which are before the Court on this allocation, I cannot postpone the prior legal mortgage on account of the mere non-possession of the title-deeds, when there is no other fact or circumstance in the case to raise a presumption or inference of fraud or gross negligence. I may add that cases, so bare of evidence, must necessarily be very rare; because in the ordinary case of an action brought by one mortgagee against another, the pleadings and the course of trial regulate or affect the burden of proof, and all the circumstances surrounding both mortgages usually come out sooner or later at the trial.

Solicitor for the legal mortgagee: *Robert A. Mullan.*
Solicitors for the Belfast Banking Co.: *Hone & Falkiner.*

W. M'G.

IN RE GYLES, DECEASED; GIBBON *v.* CHAYTOR.

(1906. No. 1134.)

Will—Married woman—Exercise of general power of appointment over reversionary fund—Legacy—Time fixed for payment of—Interest, from what time payable.

A married woman, in exercise of a general power of appointment, given by her marriage settlement over a trust fund, subject to the life interest of her husband, appointed that after his death the trust fund should be held by the trustees upon trust to pay a number of legacies to various persons, some absolutely, and some for life with remainders over, and appointed her husband residuary legatee. Her husband survived her. Upon his death the trust fund was transferred by the trustees of the settlement to her executor, who proceeded to pay the legacies. The executor of the husband, who was also executor of the wife, claimed that interest was not payable upon the legacies until the expiration of one year from the death of the husband:—

Held, (1) that a time was fixed by the will for payment of the legacies,

M. R. 1906.

GIBBON *v.* CHAYTOR.

namely, at the date of the death of the tenant for life, and that, therefore, interest ran from that date; (2) that even if no time was fixed by the will for payment of the legacies, the fund out of which they were payable being a reversionary one, the period of grace given to the executor for payment of legacies was extended from one year after the death of the testatrix to the date at which the reversionary fund fell into possession, and that interest began to run from the date of the death of the tenant for life.

SUMMONS.

By indenture, dated 19th November, 1863, made between Maria M'Guire Gyles of the first part, Nicholas Ffolliott Gyles of the second part, and George Gyles and Richard Gyles of the third part, the lands therein mentioned were conveyed to the said George Gyles and Richard Gyles, as trustees, upon trust to sell the same and stand possessed of the proceeds upon the trusts to be declared concerning the same by another indenture of the same date, and made between the said Maria M'Guire Gyles of the first part, the said Nicholas Ffolliott Gyles of the second part, the said George Gyles and Richard Gyles of the third part, Richard Gyles of the fourth part, and Elizabeth Gyles of the fifth part, being the settlement executed previous to the marriage of the said Maria M'Guire Gyles with the said Nicholas Ffolliott Gyles. By this settlement it was declared that the trustees should stand possessed of the moneys to arise from such sale, and of the rents and profits of the premises or of the unsold part thereof for the time being, upon trust, after paying the debts therein mentioned, to invest the residue, and pay the income to the said Maria M'Guire Gyles for life, and after her death to the said Nicholas Ffolliott Gyles for his life, if he should survive her, and after the death of the survivor of them, in case of there being no issue of the marriage, in trust for the said Maria M'Guire Gyles, if she should survive the said Nicholas Ffolliott Gyles; but if she should die in his lifetime, then in trust for such person or persons, and for such purposes as she should by will or codicil appoint.

Subsequently to the making of the said settlement the bulk of the lands therein referred to were sold, and the proceeds invested. There was no issue of the marriage. George Gyles and Richard Gyles, the original trustees, died, and Captain George Gyles,

of Kilmurrey, in the County of Kilkenny, and William Goff Davis Goff, of Glenorlee, in the County of Waterford, were, at the date of Mrs. Gyles's will, the trustees of the settlement.

Mrs. Gyles made her will on September 23rd, 1895, in exercise of the power of appointment contained in the settlement. By it she declared and appointed that the trustees of the said indenture should, after her death, stand possessed of all the land, moneys, stocks, funds, and securities for the time being, subject to the trusts thereof, thereinafter called the "trust fund," upon trust to pay the income thereof to her said husband, if he should survive her, during his life, as provided by the said settlement, and after his decease, upon the trusts thereinafter declared, that is to say, upon trust to pay to her nephew, the Reverend Joseph Denning, for his life, the yearly interest or dividends in respect of the sum of £1500, portion of the trust fund, and after his death to pay the like interest to the wife of the said Joseph Denning for her life, and after the death of the survivor of them, to pay £1000, being two-thirds of the said sum of £1500 to their daughter, Frances P. Devereux, absolutely, and the remaining one-third (£500) to the other surviving child of her said nephew. The testatrix then directed that the income and principal of six other sums of £1500 should be paid to other relations, and gave other pecuniary legacies to other persons absolutely, and directed that all the residue of the trust fund, both real and personal, should be held upon trust for her husband absolutely, and gave to him all income which might be owing to her at her death, including the proportionate part belonging to her estate of the income of the trust fund thereby appointed for the current half year in which her death should happen, and all other (if any) the property, both real and personal, belonging to her at her death for her separate use, and which she had power to dispose of by will to her husband absolutely. She appointed her husband and William Monk Gibbon executors of her will and trustees of her real estate (if any), not subject to the trusts of her said marriage settlement and vested in the trustees thereof, and bequeathed £100 to the said William Monk Gibbon, if he acted as such executor and trustee.

By a codicil the testatrix appointed that, in the event of her surviving her husband, the trustees of her marriage settlement

M. R. 1906.

GIBBON v. CHAYTOR.

should hold the residue of the trust fund appointed to her husband absolutely, in trust, in such event, for Richard Gyles, William Gyles, and Walter Gyles, in equal shares as tenants in common, and also in the same event devised and bequeathed the residue of her real and personal estate to the said Richard Gyles, William Gyles, and Walter Gyles, share and share alike, as tenants in common, the share or shares thereby appointed and given to any one or more of them dying without issue, to go to the survivors or survivor of them, the said Richard Gyles, William Gyles, and Walter Gyles.

The testatrix died on November 4th, 1896, and probate of the will and codicil was granted to the said William Monk Gibbon, power being reserved to make a like grant to her husband, the said Nicholas Ffolliott Gyles, the other executor. The gross value of the personal estate of the deceased amounted to £16,577 7*s.* 11*d.*

By deed of May 9th, 1896, the said William Monk Gibbon was appointed a trustee jointly with the said William Goff Davis Goff, now Sir William Goff Davis Goff, and they were the present trustees of the settlement.

Nicholas Ffolliott Gyles died on January 10th, 1906, having by his will, dated December 28th, 1904, and duly proved on March 24th, 1906, appointed the said William Monk Gibbon and Robert Law, his executors, and appointed his nephew, William John Gyles, and Walter Henry Gyles, his residuary legatees. Robert Law died on September 20th, 1906. After the death of Nicholas Ffolliott Gyles the investments and moneys standing in the joint names of William Monk Gibbon and Sir William Goff Davis Goff, as trustees of the settlement, were transferred to William Monk Gibbon, as executor of the will and codicil of Mrs. Gyles. Some of the legacies bequeathed by Mrs. Gyles's will were paid to persons absolutely entitled, reserving any rights they might have to any interest payable thereon.

On November 21st, 1906, a summons was taken out on behalf of the said William Monk Gibbon as surviving executor of Mrs. Gyles's will, for the decision of the Court upon the following questions:—

1. Whether interest was payable on the legacies bequeathed by the said will from the date of the death of Nicholas Ffolliott Gyles?

2. If not, from what date was interest payable on the said legacies?

3. At what rate was interest payable?

4. How, or out of what fund, were the costs of the summons to be paid or provided?

Charles H. Chaytor was named as a defendant to represent the persons to whom absolute legacies were given by the will, and Caroline Helen Mallett was named as a defendant to represent the persons to whom settled legacies were given by the will.

J. H. S. Russell, for the plaintiff.

Chaytor, K.C., for the defendant, C. H. Chaytor:—

The interest given to the legatees was a reversionary one. Interest runs from the time when the legacies became payable, that is, from the death of the said Nicholas Ffolliott Gyles. The will fixes the time for payment of legacies at his death, or, if it can be said that no time is fixed by the will, interest runs in a case of this kind from the death of the tenant for life: *Earle* v. *Bellingham* (*No.* 2) (1); *Re Ludlam*; *Ludlam* v. *Ludlam* (2); Theobald on Wills, 5th ed., p. 188, where the rule is stated. *Sitwell* v. *Bernard* (3) and *Wood* v. *Penoyre* (4) may be referred to; but they only show that a legatee will be entitled to interest from the end of a year after the testator's death, though the fund out of which the legacy is payable may not be recovered till a later period. The rule as to the executor having a year to pay legacies does not apply here.

Poole, for the executor and residuary legatees of the will of Nicholas Ffolliott Gyles:—

If a time for payment is fixed, interest runs from that time; but here no time is fixed: the trustees are after the death of the husband to hold the property upon the trusts declared. The legacies are not payable at the death. "After" the death is not to be construed "at" the death: *O'Donovan* v. *Kenmare* (5).

(1) 24 Beav. 448.
(2) 63 L. T. (N. S.) 330.
(3) 6 Ves. 520.
(4) 13 Ves. 333.
(5) [1896] 2 I. R. 528.

M. R. 1906.

GIBBON v. CHAYTOR.

"After" differs from "at" and "on." If there had been no life estate, would interest have been payable from the death of the testatrix? Interest is only given for delay in payment: *Donovan* v. *Needham* (1). The legacies here are general, not specific: *Tatham* v. *Drummond* (2). *Davies* v. *Fowler* (3) is distinguishable. There the testator was dealing with a specific sum of Consols, and giving aliquot parts. The residue was treated as specific. The residue here could not be so treated: *De Quetteville* v. *De Quetteville* (4); *Sealy* v. *Stawell* (5). An estate of this kind is to be treated as a wholly separate estate, and the executor of the married woman who has exercised a general power of appointment is in the same position as the executor of an ordinary testator who has a year from the death of the testator to pay the legacies. Here time was required to get the fund from the trustees of the settlement, and to ascertain the legatees. In *Staniforth* v. *Staniforth* (6) reasonable time was given for raising portions. In *Earle* v. *Bellingham* (*No.* 2) (7) the point was not argued; it was not the case of a power. The decision there was that the payment of the legacies, which were given out of a reversionary fund, was postponed till the reversion fell in, and that interest did not run until the legacies were payable, which was on the death of the widow, who was entitled to a life interest in the fund. *Ludlam* v. *Ludlam* (8) was the case of a will of a married woman in exercise of a general power of appointment over a fund subject to her husband's life interest. She gave a legacy of £400 to her brother, and the residue to her husband. The brother claimed immediate payment of his legacy, but it was held that it was not payable till the reversionary fund fell into possession, *i.e.* on the death of the husband. *In re Waters* (9) is a decision in my favour: the legacy was there held to carry interest from the death of the testator's widow, who was tenant for life, not from the expiration of one year afterwards; but the judgment proceeds entirely on the fact that the legacy was charged on land, and that the rents and profits

(1) 9 Beav. 164.
(2) 2 H. & M. 262.
(3) L. R. 16 Eq. 308.
(4) 93 L. T. (N. S.) 579.
(5) I. R. 2 Eq 326.
(6) 2 Vern. 460.
(7) 24 Beav. 448.
(8) 63 L. T. (N. S.) 330.
(9) 42 Ch. D. 517.

were to be applied as income. In *Lord* v. *Lord* (1) there was a time fixed for payment, and it was not necessary to argue that the executor should have a year after the death of the tenant for life. If interest is not payable here until a year after the death of the tenant for life, the residuary legatees of the testatrix are entitled to the income, if the executors do not pay it away in the meantime.

Meredith, K.C., for the defendant Mallett was not called upon.

THE MASTER OF THE ROLLS (2) :—

I do not entertain any doubt in this case. The will of the testatrix on its true construction fixes the time for payment of the legacies in question at the date of the death of the tenant for life. Interest is payable from that date. *Lord* v. *Lord* (1) is an absolute authority upon the point. It is suggested, however, that the words used by the testatrix in *Lord* v. *Lord* (1) were much more clear than the words used by the testatrix in the present instance. I therefore propose to state my view of the law applicable to the case, in the event of its being hereafter considered that my construction of the will, as to the date fixed for payment, is not correct. Now, I should say that the question whether the legacies bequeathed by the testatrix (except the first and second legacies) are specific legacies is a question of very great difficulty. I do not intend to deal with that question, as it is not necessary. Taking it for the purpose of this branch of my judgment that these legacies are not specific, and on the hypothesis that the time for payment has not been fixed by the testatrix, I am of opinion that interest runs from the death of the tenant for life. I find myself somewhat in the position in which Lord Hatherley (then Vice-Chancellor Page-Wood) found himself in *Tatham* v. *Drummond* (3), where he remarks :—" It is said that this point has never been decided. I am unable to believe this to be the case at this late period." The explanation of the absence of any reported decision upon the question discussed by

(1) L. R. 2 Ch. App. 782. (2) The Hon. R. E. MEREDITH. (3) 2 H. & M. 265.

M. R. 1906.

GIBBON v. CHAYTOR.

Mr. Poole is, probably, that nobody before Mr. Poole has ever been courageous enough to contest the point to the bitter end. In *Earle* v. *Bellingham* (*No.* 2) (1) and *Ludlam* v. *Ludlam* (2), and other cases, the struggle on the part of the legatees was to establish a claim to interest from the date of the expiration of the executor's year. In that struggle the legatees were consistently and invariably defeated, and the Courts, with what appears to me to be the soundest common sense, held that, where the fund out of which the legacies were payable was a reversionary fund, the period of grace given to executors for payment of legacies was extended from one year after the death of the testator to the date at which the reversionary fund fell into possession; and the interest in such cases did not begin to run from the expiration of a year from the death of the testator, but did begin to run from the date of the death of the tenant for life. I cannot accept the suggestion that the language used by Lord Romilly in *Earle* v. *Bellingham* (1) was used inadvertently. He concludes his judgment with the observation, that interest did not run "until the legacies were payable, which was on the death of the widow," who was in fact the tenant for life. I think reason and authority combine to demonstrate that this is the correct view of the law, and accordingly my answer to the first question will be "Yes"; to the second, "from the date of death of the tenant for life, viz.: 10th January, 1906"; to the third, "four per cent."; and, to the fourth, "out of the residue."

Solicitors: *W. J. Verlin, W. J. Shannon, Montgomery & Chaytor.*

W. L.

(1) 24 Beav. 448. (2) 63 L. T. (N. S.) 330.

In the MATTER of the ESTATE of MARY HESTER CULLEN (1).

Ross, J.
1907.
Jan. 14, 21.

Will—Construction—Devise of personalty—Interest for life—Absolute interest.

A devise of personalty to M. H. C. "for her life, with remainder to her issue in tail male, and in default thereof to her daughters," and in default over:—

Held, that M. H. C. took an interest for life only.

Objection to final schedule of incumbrances. By his will, dated 5th February, 1886, Mark Colgan, who died in 1886, devised and bequeathed the lands of Rockfield to his daughter Mary Hester Colgan "for her life, with remainder to her issue in tail male, and in default thereof to her daughters as tenants in common, and in default to . . ." The lands of Rockfield were held under lease for 10,000 years, dated 21st September, 1802, at the yearly rent of £138. Mary Hester Colgan, who afterwards married Hugh Cullen, by indenture of mortgage, dated 30th September, 1903, mortgaged her interest in the said lands to Maryanne Delany to secure the sum of £1100 and interest. Proceedings for the sale of the lands were begun in 1903 in the Land Commission. The sale was completed, and the proceeds were now about to be distributed. The mortgage for £1100 was returned at No. 7 on the final schedule of incumbrances as affecting the lands. The trustees of the settlement of the will of Mark Colgan filed an objection to No. 7, on the ground that the mortgage for £1100 affected only the life interest of Mary Hester Cullen, and did not affect the residue of the term.

Molony, K.C., for the mortgagee:—

Words conferring an estate tail in realty give an absolute interest in personal estate: *Leventhorpe* v. *Ashbie* (2). Here, by

(1) Before Ross, J., sitting as a Judicial Commissioner.
(2) Tudor's Real Property Cases (4th ed.), p. 382.

Ross, J. 1907. *In re* CULLEN'S ESTATE.

the words of the will itself, the testator attempted to create an estate tail in personal estate. An estate tail cannot by law be created in chattels. Therefore the first taker takes the absolute interest: *Re Cleary's Trusts* (1); *Jordan* v. *Lowe* (2).

M. J. Dunn, K.C., for the trustees of the settlement of the will of Mark Colgan:—

I rely on the exception to the general rule that, where an express life estate is given to the parent, he will only take an estate for life: *Knight* v. *Ellis* (3); *Ex parte Wynch* (4).

P. A. O'C. White, for the vendor.

Molony, K.C., in reply:—

In *Knight* v. *Ellis* (3) the Court was able to treat "issue" as a word of purchase. The words "in tail male" are used in this will, and take the case out of *Knight* v. *Ellis* (3).

Jan. 21.

Ross, J.:—

Mark Colgan made his will on 5th February, 1886. In it he uses the following words:—"I devise and bequeath the lands of Rockfield to my daughter Mary Hester Colgan for her life, with remainder to her issue in tail male"; and in default there are divers remainders over. Mary Hester Colgan married Hugh J. Cullen, and on 30th September, 1903, she and her husband mortgaged Rockfield to Maryanne Delany for £1100. It is contended on behalf of the trustees of the estate that the mortgage only affects the life estate. The mortgagee contends that it affects the entire interest of the testator in the lands.

If the estate had been held in fee-simple, an estate tail would have been created in Mary Hester Colgan. The lands, however, were only held for a term of 10,000 years. It is a well-settled rule that a bequest to a person of chattels, whether real or personal, in such terms as would in the case of a devise of real estate have

(1) 16 Ir. Ch. R. 438.
(2) 6 Beav. 350.
(3) 2 Bro. C. C. 569.
(4) 5 De G. M. & G. 188.

conferred on him an estate tail, will, as a general rule, confer an absolute interest. This rule applies not merely in cases where the will purports to confer the express estate tail, but also in cases where an estate tail in realty would be conferred by implication. The rule in *Shelley's Case* (1) is, in truth, not applicable to personal estate at all; but the Courts, in construing the instrument, gave the interest that is the nearest thing to an estate tail, namely, an absolute interest.

The rule in *Shelley's Case* (1) often defeats the intention of the testator; but it is a rule of law, and must take effect independently of the will of the testator. But where there is no estate of inheritance upon which it can operate, the Court is free to have regard to the intentions of the testator as expressed in the will. A rule of law is rigid, but rules of construction are elastic.

The marked tendency of all Courts in recent years is, where they are permitted by rules of law, to give effect to the testator's intention. Now, what would appear to the ordinary mind to have been the testator's intention? He intended that Mary Colgan should have a life interest, and that after her death it was to go to her eldest son, and so on in regular course of descent. It was not until there was a failure of her issue male, that it was to go over to others. But this estate in chattels is not transmissible by descent in the manner supposed by the testator, nor is it capable of any kind of descent whatever. Am I therefore driven to hold that the only course open to the Court is to amplify the life estate of the first taker, contrary to the testator's intention?

The case of *Knight* v. *Ellis* (2), decided by Lord Thurlow in 1780, is a direct authority for the proposition that where there purports to be a devise of an express estate for life in personalty with a gift over to the issue, the devisee only takes an estate for life. This decision has been adversely criticised; but in the authoritative case of *Ex parte Wynch* (3), decided in 1854, after the exhaustive argument, the decision was approved of, and, so far as I know, it has been followed ever since.

I am wholly unable to see that any distinction can be taken

(1) Tudor's Real Property Cases (4th ed.), p. 332.
(2) 2 Bro. C. C. 569. (3) 5 De G. M. & G. 188.

Ross, J. 1907. *In re* CULLEN'S ESTATE.

in this case where the remainder is given to the issue of Mary H. Colgan in tail male. I am, therefore, of opinion that the mortgage only affects the life interest of Mary H. Colgan in the property, and declare accordingly.

Solicitors for the mortgagee: *John Clark & Co.*
Solicitor for the vendor: *W. D. Sullivan.*
Solicitors for the trustees: *Little & Cullen.*

D. M. S.

Ross, J. 1907. Jan. 16, 22.

IN THE MATTER OF THE ESTATE OF EDWIN HEADAM HOUGH, OFFICIAL COURT RECEIVER IN THE BANKRUPTCY OF AUBREY DE VERE BEAUCLERK, OWNER; THE SCOTTISH WIDOWS' FUND LIFE ASSURANCE SOCIETY, PETITIONERS.

Land Judge's Court—Absolute order for sale—Lis pendens—*Sale by incumbrancer after order for sale—Suspension of mortgagee's right of sale.*

The absolute order for sale in the Land Judge's Court, so long as it is in full force and not stayed, operates to suspend all other powers of sale. Therefore, where a second incumbrancer, in exercise of his statutory or express power of sale, after the date of the absolute order, which had been registered as *lis pendens*, sold the lands freed and discharged from the owner's equity of redemption, the Court, at the instance of puisne incumbrancers, who would be shut out by the sale, declined to recognize the sale, and refused an application to insert the purchaser's name as owner.

APPLICATION to continue proceedings in the name of a purchaser from the second incumbrancers. The petitioners, the Scottish Widows' Fund Life Assurance Society, were first mortgagees for a sum of £30,000. The absolute order for sale was made on 6th February, 1905, and the matter was registered as *lis pendens* on 17th February, 1905. At various dates on and after 5th May, 1905, the mortgagees immediately subsequent to the petitioners, in exercise of the statutory and express powers of sale implied and expressed in their several indentures of mortgage, conveyed to William F.

Lowndes the lands, the subject-matter of the petition, freed and discharged from the equity of redemption.

The petitioners, at the instance of the purchaser, William F. Lowndes, brought the present application for an order that the matter be continued in the name of William F. Lowndes as owner, and that the proceedings be carried on between the said William F. Lowndes as owner, and the above-named petitioners as petitioners.

The application was opposed by certain puisne incumbrancers, on the ground that the effect of the sale, if held to be a valid sale, would be to destroy their securities.

R. H. Macrory, for the petitioners.

G. W. Walker, K. C., for the purchaser, William F. Lowndes :—

The sale to my client will not affect the operation of the absolute order, nor will the possession of the Court through its receiver be affected. The mortgagees have power to transfer their mortgages, notwithstanding the absolute order. The owner could sell or mortgage his equity of redemption, and, to go further, it is submitted that he could give his mortgagee a power of sale. The Land Judge's Court is a statutory Court. The onus is on the parties opposing the present application to point out the section of any Act which prevents the mortgagee exercising his express or implied power of sale. The absolute order *per se* does not interfere with the mortgagee's right, and the Court will go out of its way to protect that right. In certain cases the leave of the Court was asked, because it was a question of possible contempt, and because the possession of the Court would have been interfered with, and the order of the Court made of none effect: *In re Buswell's Estate* (1). Every mortgagee has the right of sale, except when such sale would interfere with the possession of the Court, and withdraw the estate from the operation of the Court: *In re Claire's Estate* (2); *Kelch* v. *Gormanston* (3). The Court will prevent an owner from derogating from the power of sale given by him to the mortgagee by taking proceedings in this Court: *In re Redington's Estate* (4). Applications to the Court

(1) 5 L. R. Ir. 349.
(2) 23 L. R. Ir. 281.
(3) 30 Ir. L. T. R. 103.
(4) 23 L. R. Ir. 503.

Ross, J. 1907. *In re* Beauclerk's Estate.

for liberty to exercise the power of sale, where the sale would have the effect of interfering with the Court's possession, are analogous to applications by landlords for liberty to bring ejectments for non-payment of rent. If a landlord brought his ejectment without the leave of the Court, he might be guilty of contempt of Court, but his action would be legal: *In re Battersby's Estate* (1). As to the effect of the absolute order for sale, see *In re Colclough's Estate* (2); *In re Nixon's Estate* (3); *In re Swanton's Estate* (4); *In re Morrison's Estate* (5). One of the grounds for the decision in *In re Colclough's Estate* (2) was that this Court is a public trustee for the parties. That was disapproved of in *In re Nixon's Estate* (3). The Court is now asked to extend those disapproved of grounds. The purchaser from a mortgagee searches only against previous mortgagees, not against puisne incumbrancers, who could not affect him, neither out of Court, nor, as I submit, where the estate is in Court. Beauclerk could not be heard to say that the purchaser could not buy from his mortgagee; no more can the puisne incumbrancer, who is Beauclerk's assignee, be heard.

[Ross, J.: If the puisne incumbrancer had got the absolute order for sale, could the prior incumbrancer have sold?]

G. W. Walker, K.C.: The purchaser would get a good title, though the sale might be a contempt of Court. The Court, if the present application is refused, must hold that the mortgagee's statutory right of sale is swept away by the absolute order. It cannot so hold unless by some express authority given by statute.

Charles A. O'Connor, K.C. (with him *C. Roche*), for the puisne incumbrancers:—

It would be absurd that a second mortgagee could sell notwithstanding the absolute order, whereas the first mortgagee who got the order cannot. The order for sale, as required by the rules of this Court, is registered as *lis pendens*, the effect of which is to crystallize the rights of the parties. Once the absolute order is made, the puisne incumbrancer's right to redeem prior incum-

(1) 31 L. R. Ir. 73.
(2) 8 Ir. Ch. R. 330.
(3) I. R. 9 Eq. 7.
(4) [1898] 1 I. R. 157.
(5) [1907] 1 I. R. 15.

brancers is gone. The absolute order is for the benefit of all the incumbrancers; if the second incumbrancer sells, he interferes with this right: *In re Morrison's Estate* (1). *In re Buswell's Estate* (2) rules this case, and shows that the absolute order suspends the mortgagee's right of sale. Before the present application can be heard, the final schedule of incumbrances must be settled.

C. Roche cited *In re Coloe's Estate* (3); *In re A. L. Smith's Estate* (4); *In re Ely's Estate* (5); *In re Bentley's Estate* (6).

G. W. Walker, K.C., in reply:—

In re Coloe's Estate (3) only decides that the proceedings are *in usum jus habentis*, but not that the absolute order cures any infirmity in the puisne incumbrancer's title. The registration of *lis pendens* is only to give notice to persons who otherwise would not have notice, that any persons dealing with the property deal subject to the suit. The puisne incumbrancer's right to redeem is unaffected by the absolute order for sale.

Ross, J.:—

Jan. 22.

This is an application to amend the title of the matter by inserting the name of William Frederick Lowndes as sole owner. The object of the application is to have the petition dismissed, after the petitioner's incumbrance, which is superior to the interest of W. F. Lowndes, has been paid off.

In the view I take of the matter, it is not necessary to enter into any minute examination of the facts of the case. Aubrey de V. Beauclerk was originally the owner as tenant for life, with a contingent reversion which took effect on the death of his son in 1903. He had mortgaged his life estate, and he subsequently mortgaged the entire interest he had acquired in the estate.

The absolute order for sale of the fee was made in this Court

(1) [1907] 1 I. R. 15.
(2) 5 L. R. Ir. 349.
(3) 25 L. R. Ir. 86.
(4) [1905] 1 I. R. 460.
(5) *Ibid.* 413.
(6) 37 I. L. T. R. 20.

Ross, J. 1907.

In re BEAUCLERK'S ESTATE.

in the year 1905. It appears that since that time certain mortgagees puisne to the petitioners attempted to exercise their statutory powers of sale, and Mr. Lowndes bought first the life estate and afterwards the absolute interest. In this way, notwithstanding the existence of the absolute order, he seeks to wipe out all charges puisne to the incumbrances of the mortgagees who attempted to sell under their powers of sale. He appears to have acted on the advice of some lawyer in England who had not intimately studied the Irish Landed Estates Court Act or the practice and rules and the decisions made thereunder.

As I have formerly explained, the proceedings in this Court are in the nature of a representative action. As in the case of an administration suit, the plaintiff cannot obtain relief for himself alone. The entire subject-matter is disposed of, and the proceeds distributed according to equity among all who are interested therein. In the same way in this Court the absolute order enures for the benefit of every incumbrancer, who was entitled when the proceedings began, or who became entitled during the progress of the proceedings. That is to say, everybody will be paid so far as the purchase-money will avail at the time of allocation. The solicitor having carriage is required to register the proceedings as a *lis pendens*. The rights of all parties interested in the estate are preserved as they existed at the date of the original order; time cannot run against the incumbrancer. On the other hand, the individual incumbrancer's hands are tied. He cannot put a second petition on the file to obtain what he has already got. All this has been laid down by prior decisions in this Court, and these views are authoritatively set up by the judgments of the Court of Appeal in the last reported case: *In re Morrison's Estate* (1).

It is not inconsistent with the absolute order that the incumbrancer should assign his charge pending the proceedings. Such assignment affects the assignor's own interest only. Such assignments are always recognized by this Court at the time of allocation. But the exercise of any power of sale in a mortgage is wholly inconsistent with the order for sale. The Court is selling for the benefit of all, and it will not tolerate the exercise of powers

(1) [1907] 1 I. R. 15.

of sale on the same subject-matter or on any part of the subject-matter. The potentiality of the absolute order, so long as it is in full force and not stayed, involves the suspension of all other powers of sale. I may point out that the incumbrancer is not without a remedy. If the proceedings are not conducted with diligence, he can apply for and obtain carriage of the proceedings himself. In this case, however, the mortgagees attempted to sell, and this Court will not recognize such a sale.

Mr. W. F. Lowndes has no right whatever to be named as owner, and the motion before me will therefore be refused with costs.

Solicitors for the petitioners: *Whitney & Moore.*
Solicitors for the purchaser: *Collis & Ward.*
Solicitors for the puisne incumbrancers: *William Roche & Sons.*

D. M. S.

Barton, J.
1906.
Dec. 3.

Appeal.
Dec. 14.

MILLER *v.* HATRICK.

(1906. No. 1023.)

Practice—Action to set aside agreement for sale of lands—Valuation over £30—Purchase-money under £500—Plaintiff not a party to agreement—Transfer to County Court—Jurisdiction—40 & 41 Vict. c. 56, s. 33, sub-s. (d)—*45 & 46 Vict. c. 31, s. 10, sub-s.* (b).

Where a person brings an action to set aside an agreement for the sale of lands, to which he is not a party, on the ground of fraud and undervalue, and the valuation of the lands exceeds £30, the Court has no jurisdiction to transfer the case to the County Court, although the purchase-money does not exceed £500, under the 40 & 41 Vict. c. 56, s. 33, sub-s. (*d*). In such a case the jurisdiction of the County Court arises under the 45 & 46 Vict. c. 31, s. 10, sub-s. (*b*), and cannot be exercised where the valuation of the lands exceeds £30.

MOTION.

The plaintiff's claim, in this case, was to have a sale by the defendant to James Hatrick and Edward Hall of certain lands and premises, situated in the county of Londonderry, containing about 190A. 2R. 20P., set aside on the ground of fraud and undervalue. The premises were sold for a sum of £400.

The defendant was a first mortgagee, and the plaintiff a third mortgagee, of the premises.

The lands were the subject of a judicial tenancy, and their annual valuation was £41.

The defendant applied to have the case transferred to the County Court.

The question raised was, whether the County Court Judge had jurisdiction to hear the case under the 40 & 41 Vict. c. 56, s. 33, sub-sect. (*d*), the purchase-money not exceeding £500, or whether the case fell within the provisions of the 45 & 46 Vict. c. 29, in which event the County Court Judge would have no jurisdiction to entertain the case, inasmuch as the valuation of the lands exceeded £30 ?

The 40 & 41 Vict. c. 56, s. 33, sub-sect. (*d*), confers the power and authority of the High Court of Chancery upon the County Court, in "all suits for the specific performance of any agreement for the sale, purchase, or letting of any property, or for the reforming, delivering up, or cancelling any such agreement, where, in the case of a sale or purchase, *the purchase-money shall not exceed* £500, or in the case of a letting, the annual value of the property, to which the suit relates, shall not exceed £30."

The 45 & 46 Vict. c. 31, s. 10, sub-sect. (*b*), enacts as follows:—"The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction now possessed by them, have and exercise all the power and authority of the High Court of Chancery in the suits and matters hereinafter mentioned, that is to say, where the subject-matter thereof shall not exceed in amount or value, so far as it consists of personalty, £500, and so far as it consists of lands, shall not exceed the annual value of £30 (that is to say)—(*b*) in suits for the setting aside, cancelling, or reforming any deed, agreement, assurance, conveyance of any property, on the ground of fraud or mistake.

Thomas Patton, for the defendant, moved to have the case transferred to the County Court, on the ground that the case fell within the 40 & 41 Vict. c. 56, s. 33, sub-sect. (*d*), which conferred jurisdiction on the County Court where the purchase-money did not exceed £500.

Osborne, for the plaintiff, contended that the case fell within the 45 & 46 Vict. c. 31, s. 10, sub-sect. (*b*), the earlier statute only applying *inter partes*, and that consequently the case could not be transferred to the County Court, as the valuation of the lands exceeded £30.

BARTON, J.:—

In my opinion, section 33 (*d*) of the Act of 1877 applies only to proceedings *inter partes*. I do not think it was intended by that sub-section to give jurisdiction to the County Court in a case like the present. Section 10 of the Act of 1882 applies to cases

Barton, J. 1906. MILLER v. HATRICK.

of this kind; but only where the lands in question do not exceed the value of £30. These lands, however, exceed that value. That being so, I must hold that I have no jurisdiction to transfer this case to the County Court.

J. MAC M.

Appeal. Dec. 14.

The defendant appealed.

Patton, for the appellant.

Osborne, for the plaintiff.

The Court of Appeal (SIR S. WALKER, C., and FITZ GIBBON and HOLMES, L.JJ.) affirmed the order of Barton, J., and dismissed the appeal.

Solicitor for the appellant: *Joseph Alexander.*
Solicitor for the plaintiff: *James E. O'Doherty.*

R. D. M.

VANDELEUR *v.* GLYNN AND THE ATTORNEY-GENERAL (No. 2).

M. R.
1906.
Nov. 27.

Appeal.
1907.
Jan. 14.

Practice—Costs—Taxation between party and party—Instructions for brief—Four counsel—Fees—Exercise of discretion—Attorney-General a co-defendant.

Where, on review of taxation of costs between party and party, it appears that the Taxing Master has, in fact, exercised his discretion on proper grounds, the Court will not interfere unless it be shown that the amounts allowed by him under the various items in the bill of costs are unreasonable. £20 for instructions for statement of claim, £15 15*s.* for instructions for affidavit of documents, and £130 for instructions for brief, held not to be unreasonable, considering the nature of the action.

The cost of a fourth counsel disallowed, the Taxing Master having allowed his mind to be influenced by the fact that costs could not be given against the Attorney-General.

MOTION to review taxation.

The action reported as *Vandeleur* v. *Glynn and the Attorney-General* ([1905] 1 Ir. Rep. 483, 509) occupied six days at hearing in the Rolls Court, and involved the plaintiff's title to a certain manor, quay, and tolls, and several miles of foreshore in the county Clare. Judgment was given for the plaintiff, with costs, against the defendants Glynn. The Attorney-General was joined as a co-defendant. Both defendants appealed to the Court of Appeal, and, after a hearing which occupied four days, the appeals were dismissed and the order of the Master of the Rolls was affirmed, and the defendants Glynn were ordered to pay any additional costs caused by their appeal.

The plaintiff's title commenced with a Patent of James I., dated January 19, 1621. On taxation of the costs, the Taxing Master allowed £20 for instructions for statement of claim. The work under this head included attendances by the plaintiff's solicitor and his clerk at Kilrush to search deed boxes, attendance by the former at Kilrush to search Petty Sessions records, and in Dublin to search in the Record Office, the perusal of nine docu-

M. R. 1906.

VANDELEUR v. GLYNN.

ments of title dating back to 1621, and the preparation of an abstract of title. The Taxing Master allowed £15 15*s.* for instructions for the plaintiff's affidavit of discovery of documents. These two sums represented about half the amounts claimed in the plaintiff's bill of costs. The plaintiff's solicitor claimed £250 for instructions for brief, which sum was reduced on taxation to £130. The work under this head included attendances at the Irish Land Commission to search for and obtain copies of fair rent orders, attendances at the Record Office to search for and obtain copies of several documents dating from 1658, attendances at the Custom House, Dublin, to inspect papers of the Shannon Commissioners; interviews with tenants and others to obtain evidence; correspondence with various public officials and with solicitors having custody of certain deeds; and the examination of 510 leases, and the estate books from 1809. The Taxing Master allowed a fee of £26 5*s.* for each senior counsel; the defendants objected that these items should each be reduced to £22 1*s.*, as only £15 15*s.* had been paid to junior counsel. The Taxing Master also allowed the cost of three senior counsel.

Moriarty, K.C., and *Maunsell*, for the defendants Glynn, cited *Joynt* v. *Mac Cabe* (1); *Smith* v. *Buller* (2); *Maconchy* v. *Bank of New Zealand* (3); *Dyott* v. *Reade* (4).

Matthew J. Bourke, K.C. (*Phelps* with him), for the plaintiff:—

The Taxing Master has rightly exercised his discretion in allowing the costs of a fourth counsel. The allowing of a fourth counsel is within the discretion of a Taxing Master: *Lessee of the London Society* v. *Trustees of Gwynn's Charities* (5); Bewley on Costs, p. 67.

[Counsel also cited *Barry* v. *Spaight* (6).]

(1) 33 I. L. T. R. 113.
(2) L. R. 19 Eq. 480.
(3) [1900] I. R. 27.
(4) 10 I. L. T. R. 110.
(5) Law Recorder (N.S.), vol. i., 27.
(6) 37 I. L. T. R. 244.

THE MASTER OF THE ROLLS:—

As to the fee for instructions, I have looked into the particulars, and, considering the nature of the controversy, and the personal attention necessary to enable the solicitor to deal satisfactorily with the plaintiff's case, I am satisfied that the amount allowed is reasonable, and I would not think for a moment of interfering with the discretion of the Taxing Officer—a discretion which he has exercised on proper grounds.

As regards the fees on briefs, similar observations are applicable. The fees paid to senior counsel are certainly not excessive, and should be allowed in this case, if regard is ever to be had on taxation to the importance and difficulty of a particular case. The only person who has reason to complain is the junior counsel. His fee should have approximated more closely to that of senior counsel. But there is no rule binding the Taxing Officers or the Court to cut down the fees paid to senior counsel, if in themselves reasonable, solely because the fee paid to junior counsel happens to be inadequate.

As to refresher fees, the Taxing Master was justified in his treatment of them, and, in my opinion, they have been correctly allowed.

On the commission fee, the action of the Taxing Master commends itself to me.

As to the allowances in respect of a third senior counsel, Mr. Bourke's argument was mainly this, that a fourth counsel was necessary because of there being two sets of defendants, and I think the Taxing Officer acted on the same view. The plaintiff was not merely fighting his case against the Glynns, but was also fighting against the Attorney-General. The presence of the Attorney-General as a party to the action, and a very militant party (as events proved), no doubt rendered it wise for the plaintiff to secure the services of a large and distinguished Bar to act on his behalf. But the extra costs so incurred cannot be allowed as against the Glynns. The Taxing Officer indirectly allowed costs against the Attorney-General, to be paid, however, by the Glynns. I asked the Taxing Officer to state his reasons. He says:—"All the counsel were acting in concert." He allowed this fact to influence his mind, and he was wrong.

M. R. 1906. VANDELEUR v. GLYNN.

In my opinion, as between party and party, two senior counsel should be allowed, but not the third.

The matter will be sent back to the Taxing Master to adjust the costs in accordance with my decision.

R. W. L.

Appeal. 1907. Jan. 14.

The plaintiff and defendants both appealed to the Court of Appeal (SIR SAMUEL WALKER, C., and FITZ GIBBON and HOLMES, L.JJ.).

Moriarty, K.C., and *Maunsell*, for the defendants Glynn.

Bourke, K.C., and *Phelps*, for the plaintiff.

THE COURT dismissed both appeals.

Solicitor for the plaintiff: *Cullinan.*
Solicitor for the defendants Glynn: *Fitt.*

R. D. M.

Barton, J. 1907. Jan. 14.

IN RE HAYES' SETTLED ESTATES.

(1906. No. 1273.)

Settled land—Tenant for life—Power to jointure—Exercise of power by deed—Appointment of trustees for the purposes of the Settled Land Acts—Compound settlement—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 20, *sub-s.* (2).

Where lands have been put in settlement by a will, with power to the tenant for life to charge the lands by way of jointure, and the power is exercised by the tenant for life by a deed, the will and deed do not together constitute a "compound" settlement. In such a case it is only necessary to appoint trustees, for the purposes of the Settled Land Act, of the will.

SUMMONS.

The applicant in this case was Sir Samuel Hercules Hayes, the tenant for life under the will dated 20th April, 1860, of his

father, Sir Edmund Samuel Hayes, of certain estates situate in the county of Donegal. The will conferred upon the tenant for life the power of charging the settled estates by way of jointure in favour of any woman he might marry with a sum not exceeding £1000 per annum.

By a deed dated 6th November, 1901, the tenant for life charged the settled estate with a jointure in favour of his wife, and limited a term of 200 years to the trustees of the deed for the purpose of securing the jointure.

The tenant for life applied to the Court for the appointment of trustees within the meaning of the Settled Land Act, 1882, for the purpose of carrying out a sale to the tenants under the Land Purchase Acts.

The question was whether trustees should be appointed of the will and deed together as constituting a compound settlement, or of the will only.

Overend, for the applicant :—

Instruments charging jointure or portions, whether within the Settled Land Act, 1890, sect. 4, or otherwise, do not create a "compound settlement" of which new trustees must be appointed for the purposes of the Settled Land Acts: *In re Keck & Hart's Contract* (1); *In re Du Cane & Nettlefold's Contract* (2), where *In re Meade's Settled Estates* (3) is distinguished by Stirling, J. In this case trustees of the will only should be appointed.

BARTON, J. :—

The applicant is tenant for life under his father's will, dated 20th April, 1860, which conferred upon him a power of jointuring. By deed dated 6th November, 1901, he charged the settled estates with a jointure for his wife, and limited a term of 200 years to the trustees of the deed for securing the jointure. He is about to sell part of the settled estates to the occupying tenants under the Land Purchase Acts, and he now applies to the Court to have trustees appointed for the purposes of the Settled Land Acts to

(1) [1898] 1 Ch. 617. (2) [1898] 2 Ch. 96. (3) [1897] 1 I. R. 121.

Barton, J. 1907.

In re HAYES' SETTLED ESTATES.

receive, and give receipts for, the purchase-money. The only question is, whether the trustees should be appointed in respect of the will alone as a single settlement, or in respect of the will and the subsequent deed of 1901 as a "compound settlement."

In my opinion, it is unnecessary to have trustees appointed of a compound settlement. The will is the settlement within the meaning of sub-section (1) of section 2 of the Settled Land Act, 1882, and the applicant is the tenant for life within the meaning of sub-section (5) of that section. The tenant for life can convey the settled lands discharged from the jointure, which comes within the words "all estates, interests, and charges subsisting, or to arise thereunder" in sub-section (2) of section 20. After the conveyance the jointure will be shifted to the purchase-money. That is, as I understand it, the effect of Stirling, J.,'s decision in *In re Keck & Hart's Contract* (1), to which he afterwards adhered in *In re Du Cane & Nettlefold's Contract* (2). It would be different if the jointure were a charge having priority to the settlement. In cases of that kind, which are excepted by section 20, sub-sect. (2), it is, as a general rule, necessary to appoint trustees of a compound settlement, in order to enable the tenant for life to bind the jointure. Section 4 of the Settled Land Act, 1890, cannot, in my opinion, affect the question, having regard to the limited construction put upon that section in *In re Du Cane & Nettlefold's Contract* (2). *In re Meade's Settled Estates* (3) and *In re Tibbits' Settled Estates* (4) were distinguished by Stirling, J., in the cases to which I have referred. For these reasons, I hold that the trustees may be appointed of the will only.

Solicitors for the applicant : *M'Mahon & Tweedy.*

J. MAC M.

(1) [1898] 1 Ch. 617.
(2) [1898] 2 Ch. 96, 108.
(3) [1897] 1 I. R. 121.
(4) [1897] 2 Ch. 149.

IN RE WALLACE'S ESTATE; CAULFIELD, PETITIONER(1).

Appeal. 1906. Nov. 26

Merger—Tenant in tail in possession paying off charges—Expression of intention—Benefit of remainderman—Insolvent estate.

By his will, dated the 17th February, 1858, W. J. W. devised the lands for sale to his son Thomas in tail, with remainder to Alfred in tail, with remainder to William in tail, with remainder to John in tail; and he charged the lands with ten sums of money in favour of his younger children.

The testator died in 1859, and on his death Thomas entered into possession, and died without issue in 1877, and Alfred, having predeceased Thomas, and having left no issue, William succeeded, and died in 1902 without issue, and without having disentailed.

During his lifetime William bought the legacy of £500 bequeathed to his brother Henry by the will of his father, and got it assigned to him by deed in 1884. In 1889 he paid off the legacy of £1000 bequeathed to one of his sisters, Mrs. P., without getting any assignment.

By his will, dated in 1900, William W. left legacies of £1000 each to his two sisters, Mrs. M. and Mrs. C., provided that they should, within one month, give notice in writing to the executors that they accepted the legacies in satisfaction and discharge of all claims upon the lands, and he directed that these notices should be handed over to John, the next tenant in tail in remainder. He bequeathed to John his own legacy of £500, and also the legacy purchased by him from Henry, and appointed John his residuary legatee. The lands were sold in the Land Judge's Court, and the estate was insolvent. On the final schedule of incumbrancers the executors of William were returned as incumbrancers in respect of the three legacies of £1000 left to the testator's three sisters, which he had paid off. On an objection filed by the assignee of another legatee, whose legacy was charged on the lands:—

Held (reversing the decision of Ross, J.), that the three charges were merged, and the executors were not entitled to be placed on the schedule of incumbrances.

APPEAL from the order of Ross, J., dated the 9th July, 1906, overruling an objection of Charles Uniacke Townshend to the final schedule of incumbrances.

By his will, dated the 17th February, 1858, and a codicil

(1) Before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1906. *In re* WALLACE'S ESTATE.

thereto, dated the 20th December, 1858, William James Wallace devised the lands for sale in this matter, which were held in fee-simple, and situate in the county of Wexford, to his son, Thomas Wallace, in tail, with remainder to his son, Alfred Wallace, in tail, with remainder to his son, William Arthur Wallace, in tail, with remainder to his son, John Wallace, in tail. He charged the lands with sums of £500 each for each of his sons, Thomas, Alfred, William, Henry, and Edward, on their attaining twenty-three years of age. He also bequeathed to each of his daughters, Marion (now Mrs. Watson), Anne (Mrs. Purser), Emily (Mrs. MacPherson), Elizabeth Charlotte Wallace, Margaret Florence (Mrs. Cadell), and Eleanor (Mrs. Phillips), an annuity of £30 per annum, if his wife survived him, and after the death of his wife, an additional annuity of £30 per annum, until they should respectively attain the age of twenty-one years, and thereafter, and after the death of his widow, a further annuity of £60 per annum, to be paid to them until their marriage, and on their marriage the testator bequeathed unto each the sum of £1000.

The testator died on the 8th February, 1859, and Thomas Wallace entered into possession. Thomas died in 1877, without issue; and Alfred, having died without issue in the lifetime of Thomas, William entered into possession. William died in 1902, without issue, and without having disentailed, and John Wallace, the next tenant in tail in remainder, succeeded. William Arthur Wallace, during his lifetime, bought the legacy of £500 bequeathed by his father to Henry Wallace, and got it assigned to him by deed dated 22nd July, 1884. He paid the legacy of £1000 bequeathed to his sister, Eleanor Wallace (then Mrs. Phillips), in 1889, without getting any assignment of it, but taking merely a simple receipt.

By his will dated the 14th June, 1900, William Arthur Wallace bequeathed to his sister, Mrs. Emily MacPherson, the sum of £1000 for her separate use, and to his sister, Mrs Margaret Cadell, the sum of £1000 for her separate use, provided, nevertheless, and the testator thereby declared, that the pecuniary legacies bequeathed by his will to his said two sisters should be accepted by them respectively in full satisfaction and discharge of all claims which either of them might have under and by virtue

of the said will of the said William James Wallace, the testator's father; and the testator declared that in the event of either of his said sisters declining or failing to give notice in writing to the trustees of his said will within one year from the date of his death of her intention to accept the legacy in full satisfaction of all claims which she might have under the father's will that then the legacy of the sister so declining to accept the same should fall into and form part of the testator's residue. The testator directed that these notices, if received by the trustees of the will, should be handed over to his brother John; and he bequeathed to John his own legacy of £500, and the legacy purchased by the testator from Henry, and he appointed John his residuary legatee. He appointed Andrew MacPherson and John Phillips, his executors.

After the death of William Arthur Wallace in 1902, Mrs. MacPherson and Mrs. Cadell duly elected to accept the legacy bequeathed to them, and the sum of £1000 was paid to each of them.

On the final schedule of incumbrances the executors of William Arthur Wallace were returned as claimants in respect of the three legacies of £1000 each, bequeathed to Mrs. MacPherson, Mrs. Cadell, and Mrs. Phillips. An objection was filed by Charles Uniacke Townshend, who was the assignee of another legatee, to these three legacies appearing on the schedule, on the ground that they had merged in the inheritance of the lands, and were no longer a subsisting charge.

An affidavit was filed by John Phillips, one of the executors of W. A. Wallace, in which he stated:—

> "I recollect a conversation which I had with the late Colonel Wallace about the year 1900, when he spoke to me about his will which he had made in June, 1900, shortly before calling for me. He informed me then that he had settled with Mrs. Watson, Mr. Purser, his brother Henry, and my wife, and that there only remained Mrs. MacPherson and Mrs. Cadell to be paid off, and that his will provided for these, and that he had paid these off for the purpose of benefiting his brother, John Thornhill Wallace, as he wished, on his succeeding to the estates, they should be as free from claims by his sisters as he had been able to make them, and that he had made his will accordingly."

Appeal 1906.

In re WALLACE' ESTATE.

On the 9th July, 1906, Ross, J., disallowed the objection, and C. Uniacke Townshend appealed.

Gerald FitzGibbon, for the appellants:—

The intention of the testator was to benefit his brother, and the only way he could do that was by paying off the charges, and leaving the estate as free as possible: *Morley* v. *Morley* (1). The statement made by Colonel W. A. Wallace to Mr. Phillips is admissible as evidence of the intention of the testator: *Adams* v. *Angell* (2). If a tenant in tail in possession pays off a charge on the estate, the presumption arises that he paid it off for the benefit of the estate, because he has power to acquire the fee, and defeat the remainderman; and if he does not exercise that power, the inference is that the remainderman is the object of his favour: *Jones* v. *Morgan* (3). Once a limited owner pays off an incumbrance with the intention of discharging the inheritance, he cannot afterwards revive the debt as a charge on it: *Kensington* v. *Bouverie* (4).

S. L. Brown, K.C., and *Macrory*, for the executors of Colonel Wallace:—

The estate was insolvent, and for years Colonel Wallace received nothing out of it. The only way in which he could benefit his brother was by keeping the charges alive. The intention to merge will not be imputed to a person from his dealings with the estate, when from his conduct it cannot but be presumed that he was ignorant of the position: *Burrell* v. *Earl of Egremont* (5). Here the testator was ignorant of the position, and was under an erroneous belief: he thought he was making the estate free. There was no personal liability on Colonel Wallace; he was under no covenant to pay these charges. The intention which he expressed was to benefit his brother, John Wallace; and if the Court holds there was a merger, John Wallace gets nothing, and the objector will receive payment in full.

(1) 5 D. M. & G. 610.
(2) 5 Ch. D. 634.
(3) 1 Bro. C. C. 217.
(4) 7 H. L. Cas. 557.
(5) 7 Beav. 205.

SIR SAMUEL WALKER, C.:—

We do not require to hear Mr. FitzGibbon in reply, because very early in the case I formed a clear opinion, as did also my colleagues, that the judgment of Ross, J., cannot be supported. There is no doubt of the general proposition that where the owner of an estate, less than an estate in fee, pays off a charge on the inheritance, without any expression of intention, the *onus* of proving merger is on the person alleging merger, and unless there is clear evidence of such intention, the charge must be treated as still existing. We have nothing to do, on this appeal, with anyone, except with three persons, Mrs. MacPherson, Mrs. Phillips, and Mrs. Cadell. If there be any other claim on the estate, we have nothing to do with it.

By his will William James Wallace bequeathed to each of his daughters an annuity until her marriage, and a sum of £1000 payable on her marriage, which he charged on the lands. He also bequeathed to his son Henry £500, and to William Arthur James Wallace a legacy of £1000; there were ten legacies altogether. It appears that William Arthur James Wallace paid Henry his £500, and took an assignment of the legacy to himself; so he intended that it should not be merged. In 1899 he paid off Mrs. Phillips her £1000, in broken sums, but her claim was fully satisfied. When he came to make his will in June, 1900, he had become tenant in tail in possession, in consequence of the failure of the antecedent estates, and the next owner in tail in all probability would be John Thornhill Wallace, because Colonel Wallace had no children. A great deal turns on this will. The testator says:—"I bequeath to my brother, John Thornhill Wallace, the legacy of £500 given to my late brother, Henry James Wallace, by my late father, William James Wallace, and assigned to me by the said Henry James Wallace by deed dated the 22nd July, 1884." Therefore, there is on the face of the will an intention that John should be benefited; he is the owner of that sum of money. Then he gave to John "all the share and interest to which I am or may be entitled under the will of my late father, the said William James Wallace." That carries the legacy to which he was entitled under his father's will for the benefit of the next tenant in tail. Then he left to his sisters,

Appeal. 1906.

In re WALLACE'S ESTATE.

Sir Samuel Walker, C.

Mrs. MacPherson and Mrs. Cadell £1000 each, but he adds—"Provided, nevertheless, and I declare, that the pecuniary legacies hereby bequeathed to each of my said two sisters shall be accepted by them respectively in full satisfaction and discharge of all claims which either of them may have under and by virtue of the will of my late father, the said William James Wallace, and I declare that, in the event of either of my sisters declining or failing to give notice in writing to my trustees within one year from the date of my decease of her or their intention to accept their respective legacies hereby bequeathed in full satisfaction and discharge of all claims which each or either of them may have under the said will of my late father as aforesaid, the legacy of the sister so declining to accept the same as aforesaid shall fall into and form part of the ultimate residue of my estate."

Then he goes on to say that, in the event of the notice being given, the trustees were to hand over the notice to John. The plain meaning of that is, that the next tenant in tail should have in his hands, from the executors, vouchers to show that the estate was free from these charges. It is impossible to give any other construction to the will so far than an intention to benefit John.

Of course, the law is quite clear. Colonel Wallace was tenant in tail, and therefore, on payment of any charge, there would be a presumption against merger. And then there is another presumption, namely, that if it is the interest of the owner of the estate and of the charge to keep alive the charge, it will be held not to merge. But both these presumptions must yield to any express statement of intention. As regards Mrs. Phillips—the testator had a conversation with her husband, Mr. John Phillips, in the year 1900, after he had made his will, and that conversation is deposed to clearly by Mr. Phillips. He says: "I recollect a conversation which I had with the late Colonel Wallace about the year 1900, when he spoke to me about his will, which he had made in June, 1900, shortly before calling for me. He informed me then that he had settled with Mrs. Watson, Mrs. Purser, his brother Henry, and my wife, and that there only remained Mrs. MacPherson and Mrs. Cadell to be paid off, and that his will provided for these, and that he had paid those off for the purpose of benefiting his brother, John Thornhill Wallace, as he wished

on his succeeding to the estates that they should be as free from claims by his sisters as he had been able to make them, and that he had made his will accordingly."

That is an express statement made by him, and there is no reason to doubt the accuracy or truth of the gentleman who made it. If we read that statement in connexion with the clauses in the will dealing with these charges, it is quite plain that when the testator made that statement he intended to clear the estate. As regards Mrs. MacPherson and Mrs. Cadell, that statement is also important, because it will appear, by referring to the will, that they stand in the same position as Mrs. Phillips. I cannot see how the doctrine of merger has any reference to Mrs. MacPherson or Mrs. Cadell. The payment of their charges was made out of money which the testator had accumulated, and which he possessed. It appears to me that the doctrine of merger has no application to the case of Mrs. MacPherson and Mrs. Cadell; but if it has, I import into it the statement in the will of Colonel Wallace, the notices which these two ladies were directed to give to the executors, the evidence of John Phillips, and the fact that the payments were made by the executors. How can the executors of Colonel Wallace deny that they had freed the estate, when they were told to hand over the vouchers for these payments to Mr. John Wallace, the next tenant in tail, in order to show that the estate was clear of these charges?

I am, therefore, of opinion that the judgment of Ross, J., cannot be sustained, and that the objection of Mr. FitzGibbon's client should be allowed.

FitzGibbon and Holmes, L.JJ., concurred.

Solicitors for Mr. Townshend: *Moore, Keily, & Lloyd.*

Solicitors for the executors of Colonel Wallace: *Longfield, Keily, & Armstrong.*

Solicitor having carriage: *J. E. M'Dermott.*

R. D. M.

M. R. 1906. Nov. 13.

In the MATTER of THE IRISH MERCANTILE LOAN SOCIETY and THE COMPANIES ACTS.

Companies Act, 1862—*Unregistered Company*—*Winding up*—*Friendly Societies Acts* (18 & 19 *Vict. c.* 63; 38 & 39 *Vict. c.* 60)—*Industrial and Provident Societies Acts* (15 & 16 *Vict. c.* 31; 55 & 56 *Vict. c.* 39).

The Court has jurisdiction, under sect. 199 of the Companies Act, 1862, to wind up compulsorily, as an unregistered Company, a Society registered under the Friendly Societies Acts, but not registered under the Companies Act, 1862.

The fact that such a Society has passed a resolution to dissolve, and is actually in process of dissolution, does not prevent a creditor of the Society from obtaining an order for winding up the Society.

Application by John Tracey, a judgment creditor, to have the respondent Society, the Irish Mercantile Loan Society, wound up compulsorily under the Companies Act, 1862. The Society had never been registered under the Companies Acts, but was registered under the Friendly Societies Acts. The petitioner had brought an action in the Chancery Division of the High Court of Justice in Ireland, before Mr. Justice Barton, for the purpose of having the Society declared to be the principal on foot of a certain guarantee which the petitioner had given to the Munster and Leinster Bank for the purpose of securing a debt of the Society. Under this guarantee the petitioner had guaranteed the Munster and Leinster Bank against the Society's debt to the extent of a sum of £205; and the petitioner, by the action in Mr. Justice Barton's Court, also asked for an order that the Society should pay to the Bank the amount of this debt so guaranteed by him as aforesaid. Mr. Justice Barton made the order, and directed the Society to pay the amount due on foot of the guarantee, and also gave the petitioner the costs of the action when taxed. The Society did not pay the debt, and the costs were taxed to a sum of £55 15*s.* 9*d.* Execution was issued on foot of these costs, and a return of "no goods" was made by the sheriff. Between the date of the judgment in the action before Mr. Justice Barton and

the issuing of execution the Society had duly called a meeting of its members in pursuance of the Friendly Societies Act, and at that meeting a resolution was passed to dissolve the Society, and a man called Fahy, who was Secretary to the Society, was appointed to collect the assets and discharge the liabilities. This man, at the date of the presentation of the petition, had left for America, and when the petition was heard was still in America. There were debts due to the Society and other assets outstanding.

Jefferson, K.C., for the petitioner :—

The petitioner in this case is a judgment creditor, and is, therefore, entitled to the order sought *ex debito justitiæ*. The order can be made against a Friendly Society which has not been registered under the Companies Acts, as such society is within the purview of section 199 of the Companies Act of 1862 : *Independent Loan Fund Society* (1).

T. Sullivan, for the Society :—

The order cannot be made in this case, for the Companies Acts do not apply to a Friendly Society, as the Friendly Societies Acts have provided a procedure for winding up and dissolving these Companies. The Company having passed a resolution to dissolve, and being in process of dissolution, no order can be made by this Court, and in any case this Court is not bound to make a compulsory order. Section 145 of the Companies Act gives an option to the Court to make an order under supervision. The creditors' rights will not be prejudiced by such an order : *In re New York Exchange, Limited* (2). See observations of Fry, L.J., at p. 423.

Jefferson, K.C., in reply :—

The Court cannot make a supervision order in the case of an unregistered Company, as section 199 expressly provides that the order to be made in such a case is a compulsory order : see subsection 2 of that section. Where a creditor applies for a winding up order in such a case as this he is entitled to the order as of

(1) [1895] 1 I. R. 1. (2) 39 Ch. D. 415.

M. R. 1906.

In re Irish Mercantile Loan Society.

right, inasmuch as in this case no other creditors of the Society support the Society's application to have the petition dismissed; and, therefore, as between the creditor and the Society, the creditor is entitled to the order sought: see Buckley (1902 Edition), at page 248, and cases cited.

The Master of the Rolls :—

The jurisdiction to make the order clearly exists. The question to determine is, whether under the circumstances that jurisdiction ought to be exercised in favour of the petitioner. [His Lordship referred to an unreported case, where a compulsory winding up order was granted by Porter, M.R., *In re City Provident Society and Companies Acts* (November 14, 1905).] It is unfortunate that there is no cheaper method of winding up a company, under sect. 199, than by a compulsory order. Section 199, subsect. 2, provides that "no unregistered company shall be wound up under this Act voluntarily or subject to the supervision of the Court." And, therefore, I have to choose between refusing crediditors any order which will give jurisdiction to supervise winding up, and granting a compulsory order in a case where the assets are small and principally due by persons in a humble condition of life. Mr. Sullivan relied on *In re New York Exchange, Limited* (1). He contended, and Mr. Jefferson concurred in his contention, that sect. 145, which was there dealt with by Kay, J., and the Court of Appeal, applies to cases under sect. 199. Assuming this view of *In re New York Exchange, Limited* (1), to be correct, I think the real consideration operating on the mind of the Judges in that case was, the power to continue voluntary winding up under the supervision of the Court. Cotton, L.J., says: "The Court will not make a compulsory order when a voluntary winding up is pending, unless it is satisfied that the creditor will be prejudiced by the continuance of the voluntary winding up, and this the petitioner must be taken to have known. He therefore ought to have made a case showing that having the winding up carried back to the 17th of January would be an advantage to him, for it is only by his losing that advantage that he can be prejudiced

(1) 39 Ch. D. 415.

by the continuance of the voluntary winding up. In no other respect could he be benefited by a compulsory winding up order, *since the Court has the same powers under a supervision order as under a compulsory winding up order.*"

The real contest in the case lay between the merits of a supervision order and a compulsory order. In the present case, I must either part with all control over this winding up, or take the entire control of it. In the circumstances of this case, I make an order for compulsory winding up, and adjourn to chambers.

It would certainly not be satisfactory to leave the collection of debts and discharge of liabilities in the control of Mr. Fahy, having regard to his absence from this country and his state of health.

Solicitor for the petitioner: *M. J. Hanmore.*

Solicitor for the Irish Mercantile Loan Society: *M'Padden.*

R. W. L.

RADCLIFF *v.* HAYES.

(1904. No. 787.)

Landlord and tenant—Agreement not under seal—Right of shooting—Reservation of—Grant of sporting rights—Profit à prendre.

By agreement in writing, not under seal, dated 30th July, 1898, Lord C. agreed to let to the plaintiffs part of the lands of B and C, reserving, except as thereinafter provided, the exclusive right to game and the exclusive right of shooting upon the demised premises, for one year, from 1st May, 1898, and so on, from year to year, till the letting should be determined, at the yearly rent of £45; and further agreed that the plaintiffs should, for the term of ten years from the date of the agreement, have the right of shooting over all the lands of B and C, and full authority to use proper means for the preservation of the game on the said lands. The lands (of which Lord C. was owner in fee) consisted mainly of mountain in his occupation, and also of holdings in the occupation of yearly tenants. These tenants held under agreements in writing, not under seal, made in 1868, which gave them the right of grazing on the mountain, and reserved to the landlord the exclusive right to the game and the exclusive right of shooting and sporting. Some of these tenants together

M. R. 1906.

RADCLIFF v. HAYES.

with other persons living in the neighbourhood) interfered with the plaintiffs' shooting on the mountain.

The plaintiffs brought an action for an injunction to restrain them from interfering with their right of shooting.

It was contended on behalf of the defendants—(1) that the right of shooting over the tenants' holdings was not validly reserved to Lord C., as the agreements were not under seal; (2) that the agreement made between Lord C. and the plaintiffs, not being under seal, was invalid as regards the sporting rights:

Held, (1) that the right of shooting was validly reserved; (2) that the grant of the right of shooting was not a mere license, but a demise of a profit *à prendre*, and that the agreement was valid.

TRIAL OF ACTION.

This was an action for an injunction to restrain the defendants from interfering with the plaintiffs' right of shooting. The action was tried before the Master of the Rolls with witnesses, and judgment was reserved. The facts of the case, and the arguments of counsel, are sufficiently stated in the head-note and judgment (1).

Ronan, K.C., *Samuels, K.C.*, and *J. Craig Davidson*, for the plaintiffs.

Healy, K.C., and *Robert Doyle*, for the defendants E. Hayes and Goonan.

Matheson, K.C, *Herbert Wilson, K.C.*, and *Muldoon*, for the other defendants.

The following authorities were referred to:—*Graham* v. *Ewart* (2); *Fitzgerald* v. *Fairbank* (3); *Bayley* v. *Conyngham* (4); *Clements* v. *Casey* (5); *Walsh* v. *Lonsdale* (6); *May* v. *Belleville* (7); *Wood* v. *Leadbitter* (8); *Heap* v. *Hartley* (9); *Walton* v. *Lee* (10); *Reynolds* v. *Moore* (11); *Holford* v. *Pritchard* (12); *Holford* v. *Bailey* (13); *Corcor* v. *Payne* (14); *Hanbury* v. *Jenkins* (15);

(1) Various issues of fact were raised, as appears from the judgment, but it is not material to refer to them.—[REP.]
(2) 11 Ex. 316; 7 H. L. Cas. 331.
(3) [1897] 2 Ch. 96.
(4) 15 Ir. C. L. R. 406.
(5) 40 I. L. T. R. 20.
(6) 21 Ch. D. 9.
(7) [1905] 2 Ch. 605.
(8) 13 M. & W. 838.
(9) 42 Ch. D. 461.
(10) 9 Q. B. D. 315.
(11) [1898] 2 I. R. 641.
(12) 3 Ex. 793.
(13) 13 Q. B. 426.
(14) I. R. 4 C. L. 380.
(15) [1901] 2 Ch. 401.

Wickham v. *Hawker* (1); *Lowe* v. *Adams* (2); *Lord Advocate* v. *Blantyre* (3); *Lord Advocate* v. *Young* (4); *Jones* v. *Williams* (5); 23 & 24 Vict. c. 124, sects. 1, 3, 4; Pollock on Possession, p. 36; Manwood's Forest Laws, p. 109.

THE MASTER OF THE ROLLS (6):—

July 25.

In this case the plaintiffs are William Parkins Radcliff and Francis R. Battersby. Fourteen persons were named as defendants, viz.:—Edward Hayes, Edward Tarpey, Patrick Kildea, Frank Tarpey, Patrick Hayes, Edward Hayes, Edward Hickey, Edward Tarpey, Michael Brogan, Michael Goonan, Michael Killeen, Michael Kildea, Patrick Cleary, and Thomas Hayes. One of these, Frank Tarpey, was struck out by an amendment of the pleadings; he left the country, and could not be served.

The action is brought for the purpose of obtaining an injunction restraining the defendants from obstructing and interfering with the plaintiffs or their nominees in the exercise and peaceable enjoyment of their rights of sporting, and from trespassing in pursuit of game, and from doing, or conspiring to do, any of the acts complained of in the statement of claim, or any similar acts. There was also a claim for damages, but as to that I have heard nothing in the course of the case.

The facts appear to be as follows:—The Marquis of Clanricarde is the lord of the soil of the land in question, viz., Coos North, Coos South, Derrygoolin North, Derrygoolin South, and Reynclamper, being a portion of his Galway estates. All the defendants have denied this, but they gave it up at the trial, except Michael Goonan, who claims to be owner in fee of a small holding in one of these townlands. It is not denied that Goonan occupies land of which his predecessor was tenant to the Marquis; but it is alleged that he has not paid any rent for more than twelve years, and there is no evidence that he has. Mr. Tener, the agent, stated that he had never received any rent from Michael Goonan. But this is far from making him owner in fee; and he kept out of the witness-box, though he was present in Court during a good part of the

(1) 7 M. & W. 63, 75.
(2) [1901] 2 Ch. 598.
(3) 4 A. C. 770.
(4) 12 A. C. 545.
(5) 2 M. & W. 331.
(6) The Right Hon. SIR ANDREW MARSHALL PORTER, Bart.

M. R. 1906.

RADCLIFF v. HAYES.

trial. A considerable number of tenants were also present, but an extraordinary development of the case took place. Only one of them was called as a witness, and under singular circumstances, to which I shall refer later, and it was then stated that the defendants' case was closed. I had thus no evidence by Michael Goonan of the circumstances in which he held. Why he was not called is not a matter which concerns me. Several of the other defendants are undoubted tenants holding under agreements in writing made with their predecessors. I shall have to refer to these agreements hereafter. They were proved by Toole, who was a sub-agent on the estate. He was examined on commission, as he was unable to attend Court owing to the state of his health. These agreements were all produced, and were all signed by the Marquis of Clanricarde, and witnessed as to the signatures by Toole.

Although the plaintiffs sue in respect of five townlands, at the trial only two were in question—Derrygoolin and Coos. These townlands were mostly mountain, with small arable holdings in the hands of tenants on the low grounds. The mountains were not demised to any of the tenants, nor has it been suggested that they were. Under the agreements made in 1868 the tenants on this portion of the property got rights of grazing over the mountain, and also rights of cutting turf, and it would seem that the idea had entered into the heads of the tenants that by reason of that they got exclusive rights, as occupiers of the mountain, to the sporting rights —the rights here disputed. The mountain land would appear to be good for grouse-shooting—sixteen brace were got before ten o'clock in the morning. All the land was good for winter shooting. By an agreement of July 30th, 1898, Lord Clanricarde let to Messrs. Battersby and Radcliff a holding consisting of 145 acres, situated in these townlands, for a year certain. There was a provision that they were, within four months, to spend £150 on a dwellinghouse, and, in addition to the 145 acres, the sporting rights over the whole of these townlands were demised, not for a year certain, but for a fixed period of ten years from the date of the agreement. Under this agreement the plaintiffs entered; they spent their money, £150 at least, paid their rent, and exercised their sporting rights, without interruption, till recently. Some annoyance was given in 1903, but nothing of a serious

character occurred till the 12th August, 1904. On that occasion the plaintiffs came there with their friends to shoot. They intended to drive the mountain. They had not been out long when they were joined by a mob of persons, of whom a considerable number of the defendants were proved to have formed a part. The beaters were driven off, and the plaintiffs were prevented by this mob from exercising any right of shooting at all. Colonel Radcliff shot a grouse, and there was a rush made for it. Edward Hayes came forward, and there was a scuffle about it. He put the bird in his trousers pocket, and one of the keepers took it out. There was no violent assault on that day, but there was undoubtedly an assertion of right to the game. It would seem that there were a considerable number of police on the mountain. What brought them there I really do not know. This all occurred on Derrygoolin (north and south), and no attempt was made by the plaintiffs to shoot on the arable lands in occupation of tenants. The time of year alone would have prevented that.

Thus any assertion of title made by the defendants on that occasion was of title to the game upon the mountain, because no other was at the moment asserted by the plaintiffs.

The pleadings of the defendants deny that Lord Clanricarde had or has any title at all to these five townlands, and that any of the defendants are his tenants. During the course of the case I drew the attention of counsel for the defendants to the gravity of such a contention. If they denied that they were tenants, and repudiated the title of the landlord, they might very much prejudice any claim they might make at any future time under any Land Act. Accordingly, this point was not pressed at the trial.

Thus, the question is narrowed down to the simple points:— (1) Had Lord Clanricarde the right to confer upon the plaintiffs the right of sporting as in the agreement of 1898? and, if so, (2) was the agreement of that date sufficient to enable the plaintiffs to maintain actions for interfering with them? and at the trial this was still further limited by giving up the defences as to Coos (north and south), and later on, by further abandoning any defence as to the mountain, and limiting it to the tenants' holdings, which were not invaded on the 12th August at all.

Had Lord Clanricarde the right of shooting over the five town-

M. R. 1906.

RADCLIFF v. HAYES.

lands? In every way possible the right of shooting over these five townlands had been enjoyed by Lord Clanricarde. I need not go into the evidence that was given on this point—for example, as to the late marquis and his son and daughter going out to shoot over the property, and that good feeling prevailed between him and the tenants; but enjoyment of the sporting rights over the whole property for forty years at least by Lord Clanricarde and his predecessors was proved. Being owner in fee, he had the rights as of course unless he or his predecessors had parted with them. But the lands other than mountain were in the hands of tenants, who might *prima facie* have the sporting rights. Had they? They allege that they had uninterruptedly enjoyed these rights, and that they, and not Lord Clanricarde, had the sporting rights. Well, but they all ran away at the trial, except one man, Kildea, who was examined under singular circumstances. There was not a scrap of evidence that any one of them had exercised any sporting rights, or that any one of them, or anyone on the lands, had a gun. It was proved that some of them had poached, and it would be a strange thing indeed if they had not. When one remembers the position of the property, remote from the residence of the owner, not under the immediate control of landlord, or agent, or anybody else, anyone who knows anything of the west of Ireland would say that if a witness stated that in such circumstances there was no poaching, he would not be worthy of credit. The defendants Edward Hayes and Thomas Hayes were sons of John Hayes. John Hayes held part of the lands of Derrygoolin as yearly tenant to the Marquis of Clanricarde at the yearly rent of £13 10*s.* under an agreement in writing dated March 13, 1879, which reserved to the Marquis the right of shooting, but did not give Hayes any grazing right on the mountain. This holding was in 1891 divided between his sons Edward and Thomas Hayes at the request of John Hayes. The agreements of 1868 are all in the same form. They were found recently amongst the estate muniments, and there would have been great difficulty in proving anything with regard to them, but that Toole, who witnessed them, as I have said, was alive and able to give evidence. These documents are on a printed form, and show, when coupled with the exercise of sporting rights by the late Marquis and the present Marquis

(through his agents), that all sporting rights were meant to be reserved. Were they? What are these agreements? I take one of them, made between the Marquis of Clanricarde and Michael Goonan, the father of the defendant Goonan. By it Michael Goonan agrees to take, and the Marquis agrees to let, subject to the reservation of the exclusive right to the game upon the said lands and right of sporting over same, and the trees and timber growing or to be found thereon thereinafter provided for, part of the lands of Derrygoolin with the buildings thereon, said lands containing 3 acres together with grazing on mountain, subject to survey, on a tenancy from year to year, determinable on the 1st March in every year, by service of the usual six months' notice to quit, and to cease and determine on the 1st November next after the death of the said Michael Goonan, without any notice whatever, subject to the rent of £6, payable half-yearly on every 1st May and 1st November. The defendant Michael Goonan occupied considerably more than 3 acres, about 25 acres, but there may have been an encroachment. Then came provisions as to husbandry and management, which I suppose were not observed, and restrictions as to improvements, which are not material. The important part of the agreement is what follows:—"That the said Marquis, his heirs or assigns, shall have the exclusive right to the game on the said lands during the continuation of the said tenancy, as the said word 'game' is defined in 27 & 28 Vict. c. 67, and to all other game of every kind that may be found thereon during said tenancy; and that he the said Marquis, his heirs and assigns, shall have the exclusive right of hunting, fowling, and fishing over, from, and off the said lands and every part thereof, and the right of entering the same for the purpose with servants, friends, and others, whom he or they may permit to exercise this right, the said Michael Goonan undertaking to use his best endeavours to preserve and protect the game that may be, or be found, on the said demised premises during his said tenancy, and to prevent all unlawful or unauthorised trespassing on said lands in pursuit of game, and the said Marquis for himself, his heirs and assigns, hereby agrees that if the said Michael Goonan shall duly and sufficiently observe, perform, fulfil, and keep all and every the conditions and agreements hereinbefore provided to be kept, observed, and fulfilled by him, that he, the

M. R. 1906.

RADCLIFF v. HAYES.

said Marquis, shall accept and receive the yearly rent of £3 in lieu and stead of the yearly rent hereinbefore reserved or made payable, such lesser rent to be payable half-yearly on the days and times hereinbefore-mentioned, as long as the said tenancy shall continue." This agreement and all the others are signed by the landlord and tenant, and witnessed. These agreements, as I have said, are on a printed form.

Were they good in point of law? They are not under seal. Before the Land Act of 1870 landlords often let lands to tenants without any reservation of the game, but this was then unimportant, as it was in the power of the landlord to serve a notice to quit, and, if the tenant objected to the landlord going upon the land to shoot, the landlord could give the tenant a notice to quit, which would determine his tenancy in six months from the next gale day. Therefore there was small reason for reserving the right of shooting. It may be that in the year 1868 legislation was apprehended by some landlords. But these agreements are formal, and, if valid, reserve the game to Lord Clanricarde. The Landlord and Tenant Law Amendment (Ireland) Act, 1860, 23 & 24 Vict. c. 154, commonly called Deasy's Act, regulated the law of landlord and tenant at this time. It made the relation of landlord and tenant depend upon contract, and no reversion was necessary. By sect. 1 "lands" are defined to include "tenements" of every tenure, whether corporeal or incorporeal. It is needless to say that there is no such enactment in England, where the old law still prevails. The word "lease" is defined by the same section as "any instrument in writing, whether under seal or not, containing a contract of tenancy in respect of any lands, in consideration of a rent or return." Section 3 enacts: "The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent." By section 1 the word "agreement" includes "every covenant, contract, or condition expressed or implied in any lease." Section 4 enacts that "every lease or contract with respect to lands whereby the relation of land-

lord and tenant is intended to be created for any freehold estate or interest, or for any definite period of time not being from year to year or any lesser period, shall be by deed executed, or note in writing signed by the landlord, or his agent thereunto lawfully authorised in writing." As the tenancies of the tenants here were from year to year, there was no occasion for an agreement in writing signed by the landlord or his agent. That does not apply to the case of the plaintiffs, who have a tenancy for a year certain and so on from year to year. Thus in the cases of these agreements, which apply to the holdings of at least six of the defendants, the right of sporting is reserved to the landlord, if such a right can be validly reserved in a lease not under seal. The argument put forward for the tenants was this: that the right of sporting is not an exception, but a reservation, and should still be under seal, being an incorporeal hereditament, granted by the tenant to the landlord. As the tenant is the grantor, and is not the landlord of his landlord in respect of it, even under Deasy's Act, and though the tenants signed the agreements and held under them, the reservation is under the old law and invalid as a grant of an incorporeal hereditament. This would be a grotesque result. The lease must be valid or invalid as a whole. All the conditions in section 4 were complied with. The point, so far as I know, was never suggested before this case.

I put a question when this point was raised, to which I received no answer. Rent payable out of lands is a reservation. If it must be treated as a grant by the tenant, the result would be that no agreement for rent would be valid unless it was executed by the tenant and under seal. The landlord could not sue for rent. He might bring an action for use and occupation; he could not sue on the agreement, if it was not under seal. He would have to sue on a *quantum meruit* and take his chance of what would happen. But a tenant holding under a lease cannot dispute its terms. His proper course would be to surrender and give up possession, and then try the question, or else to come to the Court to have the lease reformed, if he could make a case for it. This was decided in *May* v. *Belleville* (1). That was not a case of a

(1) [1905] 2 Ch. 605.

M. R. 1906.

RADCLIFF v. HAYES.

right of shooting, but of a right of way, which was reserved to the vendor in a conveyance to a purchaser, but not executed by the purchaser. [The Master of the Rolls referred to the facts of the case.] Buckley, J., says there, at page 612 : " Under that conveyance Jay took possession. Was Jay, then, entitled to say that inasmuch as the right of way could only be created by grant, and he did not execute the deed, there existed no right of way, and that the reservation effected nothing? In other words, if there were rights of way previously exercised in respect of such farms, can he say, by reason of his non-execution of the deed, " I am not bound by that " ? In my judgment he cannot. Suppose Jay were the defendant in this action. He is a person who has taken possession of the property under a conveyance which shows that he is to make a certain grant. What right has he to say that he is not bound in equity to give effect to the terms upon which he so obtained possession ? The Statute of Frauds does not apply ; there is part possession ; the bargain is shown by the terms of the conveyance. Jay can be called upon by the plaintiffs to give effect to the terms upon which he obtained possession, namely, the assertion of those rights of way. The defendant is not Jay, but she derives title under Jay. She is a person who subsequently became a transferee of a mortgage which was executed by Jay in favour of one Donaldson, and who derives title under Jay, and necessarily, therefore, has notice of the deed of June 24, 1902, and of the reservation which was contained in it. How can she say that she is not bound by the rights which existed, as it seems to me they did, as against Jay ? "

That states the law clearly. I believe that I decided the same point in *Clements* v. *Casey* (1). I am of opinion that the reservation of game and sporting rights in all these agreements is valid, and that the right to it was, at any rate from 1868, in Lord Clanricarde. The absence of the defendants from the witness-box is a fact not to be lost sight of in considering this point.

Then, the defendants argue that the letting to the plaintiffs, so far as it relates to sporting rights, is invalid. That it is good as to the lands actually demised, there is no dispute. But as to the right to shoot over other lands, that is strenuously denied. The

(1) 40 I. L. T. R. 20.

agreement was dated July 30th, 1898, as I have already mentioned. By it the landlord agrees to let, and the plaintiffs—who were called the tenants—to take, that part of the lands of Coos North, Coos South, Derrygoolin North, Derrygoolin South, and Reynclamper, containing 145 acres Irish Plantation Measure, or thereabouts, then in the possession of the landlord, reserving thereout to the landlord, his heirs and assigns, except as thereinafter provided, the exclusive right to all game of every kind and description whatsoever, and also reserving to him, and them, and to all and every person, or persons, by his or their appointment and permission respectively, the exclusive right, privilege, and liberty of hunting, fishing, fowling, coursing, and shooting upon the said demised premises for the term of one year, from the 1st May, 1898, and so on, from year to year, till this letting shall be determined at the yearly rent of £45. The tenants agree to pay the rent, and to keep the premises in repair, and to expend £150 at least in re-building the house on the holding. The landlord then agrees "that the said tenants, or the survivor of them, shall for the term of ten years, from the date of these presents, have the right of the shooting, fishing, fowling, coursing, and sporting over and upon the said townlands of Coos North, Coos South, Derrygoolin North, Derrygoolin South, and Reynclamper, and full authority to use all proper means for the preservation of the game on the said lands, and to prosecute all persons trespassing thereon in pursuit of game, and under the existing or future Acts of Parliament, to apply for and receive compensation for unlawful or malicious injury to the said lands so far as the game may be affected thereby. Provided always that such grant shall not empower the said tenants, or the survivor of them, to sublet, or farm out, the game on the said lands, or the sporting rights thereon, which shall be used and exercised only by the said tenants themselves, persons in their employment, or guests of the said tenants; and the said landlord agrees with the said tenants, that whilst the rent is paid, and the agreements on the part of the tenants performed and observed, the said tenants may peaceably and quietly have, hold, and enjoy the premises during the continuance of the tenancy hereby created, without any interruption from the said landlord."

M. R. 1906.

RADCLIFF v. HAYES.

It is a letting of land, with a superadded agreement as to sporting rights over other lands. A very common thing. It is a poor specimen of conveyancing, but the meaning is quite clear. As to the right to shoot, the first question is whether it is in this lease a mere license, that is, a concession of leave to enter and shoot birds, &c., so that the licensee would not be as between him and the licensor a trespasser; or does it confer a profit *à prendre*, that is, the right to the game when shot, with power to carry it away, which is an interest in lands? If the former, it was revocable; if the latter, it was coupled with an interest, and irrevocable. So far as the defendants are concerned, it matters nothing whether it is an irrevocable licence, or a demise of a profit *à prendre*. In either case, when they interfere with the right, they are liable. Is it, then, a profit *à prendre*? I do not suppose it would ever cross the mind of anyone but an accomplished lawyer to imagine that an agreement of this sort meant that the tenant, or licensee, must leave any game he shot lying on the ground. Hundreds of shooting lettings are made every year in this country in language not very unlike this, and large sums paid for them; and anyone knows what is meant, viz.: that the game when shot, as well as the right to shoot it, is the subject-matter of the contract. The right to cut turf includes the right to the turf when cut The right to mine or quarry involves that of taking away the mineral or stone. The right to fish involves the right to carry away fish caught. *Graham* v. *Ewart* (1), affirmed in the House of Lords (2), was the case of an Act of Parliament, and, therefore, has no bearing on the question of the form of the reservation, or the necessity of a reservation under seal. No such question could arise there. But the Judges having been consulted, the Lord Chancellor, Lord Campbell, said (at p. 344), as to the nature of the right:—"My Lords, after attentively considering this case, I am bound to say that I entirely agree with the opinion of the majority of the Judges who were consulted by your Lordships. The nature of the right in question is exceedingly well explained in a learned and lucid judgment pronounced by my noble and learned friend on my left, when a Judge of the Court of Exchequer, in the

(1) 11 Ex. 316. (2) 7 H. L. Cas. 331.

case of *Wickham* v. *Hawker* (1)" (he refers to Lord Wensleydale, then Baron Parke), "and from that it appears that this is an interest in the realty, which is well known to the law. The property in animals *feræ naturæ*, while they are of the soil, belongs to the owner of the soil, and he may grant a right to others to come and take them by a grant of hunting, shooting, fishing, and so forth; that right may be granted by the owner of the fee-simple, and such a grant is a license of a profit *à prendre*. Substantially it may be reserved by the owner of the fee-simple when he alienates, although it is considered that, technically speaking, in such a case it is a re-grant of the right by the alienee of the fee-simple. Now, my Lords, this being so, I think we must consider that Sir James Graham, being the owner of the fee-simple of the estate, had the right in him, and that substantially the bargain between him and those who were to become the allottees of the fee was, that this right, which he had, should be reserved to him when this land was allotted to them under the Act of Parliament." The Lord Chancellor then discusses the special circumstances of that case.

Fitzgerald v. *Fairbank* (2) was the case of a deed. In this country, as I have said, a letting of an incorporeal hereditament can be without seal. But in other respects it is important as showing (no doubt in the case of fishing) that the owner of such a right can maintain trespass for interference with it, and that it involves the right to the fish caught. Lindley, L.J., there says, at p. 100: "I confess that I am rather astonished at the arguments which have been adduced by the learned counsel for the appellant. In 1891 Lord Ebury granted to the plaintiffs, for a term of years, 'the exclusive right of fishing' in a defined part of the river Colne. 'The right of fishing hereby granted shall only extend to fair rod and line angling at proper seasons, and £5 netting for the sole purpose of procuring fish baits.' Then there are provisions which may or may not be important—as at present advised I think they are not important—namely, that the lessees are to cut and keep down the weeds and attend to the banks and restock with fish. The first question is, What is granted by this deed? What passed to the grantees by the words 'exclusive right of fishing'? Mr. Bramwell Davis

(1) 7 M. & W. 63, 75. (2) [1897] 2 Ch. 96.

M. R. 1906.

RADCLIFF v. HAYES.

contended that they only gave the right of catching fish, and did not include the right of taking away the fish caught; that it was a license to hook the fish and leave the fish when hooked in the water, or somewhere else. No authority whatever was referred to in support of this very strange contention, and on looking into the authorities we find that such a proposition cannot for a moment be sustained. It was laid down in *Smith* v. *Kemp* (1), and reported in Comyn's Digest, 5th ed., vol. v., p. 362, 'Piscary'—'If a grant be *de liberâ piscariâ*, the grantee shall have the property of the fish there, and shall maintain trespass for fishing there.' You cannot draw any distinction with reference to the right of taking away the fish between one kind of right of fishing and another. If a person chooses to pay for the amusement of catching fish and leaving them in the water, of course he can do so; but that is not what is understood by lawyers or men of sense as a right of fishing. The right of fishing includes the right to take away fish unless the contrary is expressly stipulated. I have not the slightest doubt of that. Therefore, the plaintiffs have a right as distinguished from a mere revocable license. What kind of right is it? It is more than an easement; it is what is commonly called a profit *à prendre*, and it is of such a nature, that a person who enjoys that right, has such possessory rights that he can bring an action for trespass at common law for the infringement of those rights. The law on this subject was very carefully considered, and will be found laid down in *Holford* v. *Bailey* (2) in the Exchequer Chamber."

That was a case of fishing. If you put shooting instead of fishing, and substitute game for fish, there appears to be no distinction. In the present case, the grant is of "the right of *the* shooting," &c., with full "authority to use all proper means for the preservation of *the* game on the said lands." For whom? "And to prevent all persons trespassing thereon in pursuit of game . . . and to receive compensation for malicious injury to the lands in so far as the game may be affected thereby." Why? But "not . . . to sublet or farm out the game on said lands." How could they, if they had no right to the game? Then, immediately after the clauses relating to game, follows the covenant for quiet enjoyment of the premises whilst rent is paid "during the

(1) 2 Salk. 637. (2) 13 Q. B. 426.

continuance of the contract of tenancy hereby created." It was suggested, but I think without foundation, that this covenant was limited to the 145 acres demised. In my opinion, this agreement is a lease or letting, and not a mere license; a lease of the house and land attached to it, and also of the shooting over a larger tract, in consideration of one rent payable in respect of all. Even if a license coupled with an interest, it would, during the existence of the agreement, confer an irrevocable right, perfectly valid and sufficient as against lawless intruders. I think it is, however, more than that, and amounts to a ten-year demise of the profit *à prendre*. Either way, the plaintiffs are entitled to succeed.

All the defendants here justified, and in their pleadings, and at the trial, all, save Goonan and Killeen, have denied the right of the plaintiffs, and asserted the right to use force amounting to violence and prevent the plaintiffs from exercising their right.

The case of all the defendants who are proved to have taken part in the unlawful assembly on August 12th, 1904, is the same, whether they were tenants of Lord Clanricarde or not. Those who are not themselves tenants are in a worse position than those who were, for they are mere trespassers on the plaintiffs' rights. The real nature of the defendants' claims, as it appeared before me, was, that they had no objection to the shooting on the mountain, at least if they were paid for it instead of Lord Clanricarde. Greed, as is so often the case in the assertion of such claims, is at the bottom of the whole thing. As to the mountain lands on Derrygoolin, no pretence of defence was made, apart from the futile contention on the wording or form of the plaintiffs' agreement; and as to Coos and Reynclamper, not even that was attempted. There must, therefore, be an injunction, with costs, against Edward Hayes, Edward Tarpey, Edward Hickey, Thomas Hayes, Michael Brogan, Patrick Cleary, Patrick Hayes, Michael Keon (or Koen), and Patrick Kildea (Frank Tarpey has been struck out; I think he is dead); Michael Goonan, Michael Killeen, and Edward Tarpey (2nd), though they have pleaded denying the plaintiffs' title, some with the others, some separately, are not shown to have been present on the occasion of August 12th, 1904. As to Goonan there is evidence that he was there. He certainly was here in Court, and disappeared

M. R. 1906. RADCLIFF *v.* HAYES.

without giving us the benefit of his denial. But an undoubted mistake was made in his identification by one of the plaintiff's witnesses, and, on the whole, it is best to take it as not proved to my satisfaction that he was a participator. As to his defence that he has not paid rent for twelve years, even if true—and it would seem to be true having regard to Mr. Tener's statement—a good deal more would have to be proved before he could establish a title in fee to his little holding. But even if he did establish that, his defence ought to have been limited, but is not. Against the three defendants I have last named there will be an injunction, but without costs.

Solicitor for the plaintiffs: *Goddard.*
Solicitor for the defendants: *Kilbride.*

W. L.

Meredith, J. 1906. July 20. Dec. 4. *Appeal.* 1907. Jan. 15, 28.

J. DAYROLLES CROSBIE, VENDOR; JOHN NEILAN, TENANT.

SAME, VENDOR; JEREMIAH CREAN, TENANT.

Landlord and tenant—Land purchase—Agreement as to price—Arrears of rent—Bonus—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *ss.* 48, 24, *sub-s.* 8.

In a sale by a landlord of an estate under the Irish Land Act, 1903, to the tenants, arrears of rent may be included in estimating the purchase-price of the holdings, and the bonus is payable on the full amount of the purchase-money, notwithstanding that arrears of rent due by the tenants have been taken into consideration in arriving at that price.

QUESTIONS of law submitted to Meredith, J., by the Estates Commissioners for decision. The memorandum of the Estates Commissioners, dated the 18th May, 1906, was as follows:—

"In this case the vendor is the absolute owner of the estate, and has entered into agreements for the sale thereof direct to the tenants.

"John Neilan, one of the purchasing tenants on the said estate, was tenant to the vendor of his holding at a rent of £38, fixed by

agreement for a second statutory term, dated the 6th April, 1904, and filed in the Land Commission on the 20th July, 1904.

"The rent for the first statutory term was the sum of £47 10*s*. On the 2nd June, 1904, the vendor agreed to sell, and the said John Neilan agreed to purchase, the said holding for the sum of £1034; and on the 20th June, 1904, the said agreement and the application for an advance of the said sum of £1034 was lodged in the Land Commission.

"The arrears of rent due by the said John Neilan in respect of the said holding immediately prior to the signing of the said purchase agreement, as admitted by the vendor, amounted to the sum of £228.

"It is also admitted that the sum of £1034 applied for includes the sum of £59, part of the said total arrears due by the said tenant at the date of signing the said purchase agreement.

"The said sum of £1034 amounts to 27·2 years' purchase of the said £38; and if the said sum is advanced, the annuity payable would amount to £33 12*s*. 2*d*., being less than the present rent by 11·6 per cent.

"The Estates Commissioners have provisionally declared the lands for sale, including the holding of the said John Neilan, an estate for the purposes of the Act.

"The Estates Commissioners beg to refer the following questions of law for the decision of the Judicial Commissioner:—

"1. Whether the entire of the said sum of £59, or any portion thereof, can be included in the advance to be made out of the Land Purchase Fund to the said tenant?

"2. In the event of its being decided that an advance can be made of the said sum of £59, or any portion thereof, do the provisions of section 1 (1) apply?

"3. In the event of its being decided that an advance can be made of the said sum of £59, or any portion thereof, would the percentage payable on the purchase-money be payable on the said sum of £59 or such portion thereof as was advanced?

"4. In the event of its being decided that an advance cannot be made of the said sum of £59, or any portion thereof, then is the said purchase agreement wholly void and inoperative as between the parties thereto?"

Meredith, J. 1906.

In re Crosbie's Estate.

The vendor, James D. Crosbie, made an affidavit, filed the 25th June, 1906, from which the following facts appeared:—

The basis of sale on his estate was stated in this way—first-term tenants were to receive a reduction of 30 per cent., or 6*s.* in the £1; second-term tenants, 20 per cent., or 4*s.* in the £1. The half-year's rent then payable either to be paid in cash or added to the purchase-money at the tenants' option; arrears to be liberally dealt with on the merits of each case.

The meaning of these terms was clearly explained by him at general meetings of the tenants, and also to any individual tenant who made inquiries, and every tenant thoroughly understood that the meaning of them was that the purchase-money of all judicial tenants, whose rents were fixed before 1896 (for shortness, called first-term tenants), was to be calculated in the following manner, namely:—the rent was to be reduced by 6*s.* in the £1, the resultant was to be taken as an annuity at 3¼ per cent., payable under the Irish Land Act, 1903, and the principal sum which such an annuity would represent was to be calculated; to this principal sum was to be added the half-year's rent unless paid; and where arrears were due a further sum was to be added in satisfaction of such arrears, and the resultant of these calculations was to be the purchase-money. There never was any purchase-money except the one purchase-money, the resultant of the aforesaid calculations. Eventually the tenants accepted the landlord's terms, and most of them preferred not to pay the half-year's rent in cash, and the vendor appointed the 1st and 2nd June for signing the agreements. Before those days, the vendor had each tenant's purchase-money calculated, and communicated the figures to him. The question as to arrears of rent was settled with each tenant.

With regard to John Neilan, his purchase-money was arrived at, in accordance with the above terms, as follows:—20 per cent. off rent of £38 gave an instalment of £30 8*s.*, representing a capital sum of £935; to this was added £19 for half-year's rent then payable, and £40 in full satisfaction of the arrears of rent, then amounting to £228; and the resultant of £1034 was the purchase-money. The vendor most distinctly explained and agreed with Neilan as to the half-year's rent, and £40 arrears

being taken into consideration in manner aforesaid in arriving at his purchase-money, and he had accepted the vendor's figures prior to the date of signing the agreement.

The facts of Crean's case were similar to Neilan's, and the questions submitted for decision by the Estates Commissioners were similar to those raised by the memorandum in Neilan's case. Jeremiah Crean was tenant to the vendor of his holding at a rent of £40, fixed by a fair rent agreement for a second statutory term filed in the Land Commission on the 26th April, 1904. The rent for the first statutory term was the sum of £49 10*s.* fixed by fair rent agreement, lodged in the Land Commission on the 24th October, 1883.

On the 1st June, 1904, the vendor agreed to sell, and Crean agreed to purchase, the holding for the sum of £1015; and on the 24th June, 1904, the agreement and application for an advance were lodged in the Land Commission.

The arrears of rent due by Crean in respect of the holding, immediately prior to the signing of the said purchase agreement, amounted to the sum of £105 8*s.* 9*d.*

The purchase-money of £1015 was arrived at as follows:—A reduction of 20 per cent. off the rent of £40 gave an annuity of £32, which, capitalized at 3¼ per cent., amounted to £985 (calculating to nearest pound). To this a sum of £20 was added, the half-year's rent then payable, and also a sum of £10 in lieu of arrears, making together £30, which, added to £985, made the £1015 stated in the agreement.

The questions asked in Crean's case were the same as those in Neilan's case, save for this, that in Neilan's case the questions were asked as to the sum of £59 (being the half-year's rent and the amount added on account of arrears of rent), and in Crean's case they were asked as to the sum of £1015 (being the entire amount of the advance applied for).

The case came before Meredith, J., for decision of the questions submitted in the above-mentioned memoranda.

W. M. Jellett, K.C., and *T. H. Maxwell*, for the vendor.

The Solicitor-General (*Redmond J. Barry, K.C.*) and *Dudley White*, for the Treasury.

Meredith, J. 1906. *In re* CROSBIE'S ESTATE. Dec. 4.

MR. JUSTICE MEREDITH having been appointed Master of the Rolls, his judgment was read by

WYLIE, J., as follows:—

The purchase-money of the holdings of John Neilan and Jeremiah Crean includes a sum ear-marked in each case as the price of certain arrears of rent due by the tenant to the landlord at the date of the purchase-agreement. The question to be decided is whether all or any portion of the sum so included can be advanced by the Land Commission out of the Land Purchase Fund. In my opinion, section 24, sub-sect. (8), of the Irish Land Act, 1903, supplies the answer to the question in both its branches. The sub-section is as follows:—"In the case of the sale of an estate, where at the date hereinafter mentioned arrears of rent were due in respect of any holding on the estate, a sum equivalent in amount to those arrears, but not exceeding in any case one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use. The aforesaid date shall be, in the case of an estate purchased by the Land Commission, the date of the agreement for that purchase, and in the case of an estate purchased by other persons, the date of the agreement for the purchase of the holding."

It appears to me that this sub-section was the inevitable outcome of the legislation with regard to arrears of rent which preceded the Act of 1903.

The problem of arrears and how to deal with them, in connexion with sales under the Land Purchase Acts, had long been one of difficulty and importance to landlord and tenant alike. It is not necessary to go back further than the case of *Vickery* v. *Deane* (1) to realise how closely arrears of rent had become connected with "purchase-money" of the holding. In the course of his judgment (page 43) Johnson, J., says:—"The Land Commission Rules, 5th December, 1887, under the Land Purchase (Ireland) Act, 1887, permitted the insertion in the agreement for sale between landlord and tenant of a provision that the purchase-money *should include rent due and to accrue due*; and Rule 55

(1) 32 L. R. Ir. 37.

required the Land Commissioners, before signing a vesting order or making an advance, to be satisfied that the tenant's rent had been paid, satisfied, or released. The Purchase of Land Act (Ireland), 1888, 51 & 52 Vict. c. 49, rendered this Rule 55 unnecessary by making the order of approval of itself operate as a discharge (conditional or absolute, as the case may be) of the rent and arrears at the date of the agreement, and leaving it to the parties, if they think fit, before they invoke the aid of the statutory powers of the Land Commission to clear up the arrears, instead of subjecting them to the operation of the statute. Accordingly, this Rule 55 does not appear in the present rules governing the redemption of rent."

The precise wording of Clause (e) in Form 3 in the Appendix to the Rules of 5th December, 1887, is as follows:—"The purchase-money is inclusive of all rent due, or to accrue due, out of the said holding up to the day of , 188 , (1) from which date the said tenant shall discharge all outgoings and pay to the said landlord interest at the rate of £4 per cent. per annum on his purchase-money or the part thereof remaining unpaid, until the same shall be paid or advanced to or for the benefit of the landlord."

"(1) If this clause be inserted, the date referred to should not be an earlier date than the gale-day immediately preceding the date of the agreement."

After the Act of 1888 came the Land Law (Ireland) Act, 1896, sections 31 and 35.

In reference to these sections, I desire to call attention to the decision of the Lord Chief Baron in *Burchall* v. *Coyle* and *Burchall* v. *Crawford* (1). It is not unworthy of note that the learned Lord Chief Baron's decision was pronounced on the 3rd July, 1903, and appeared in the issue of the Irish Law Times Reports, published on the 18th July, 1903. The Land Act of 1903 received the Royal assent on the 14th August, 1903.

The judgment of the Chief Baron, as reported, is brief. "These dismisses are right"; he says:—"The policy of the Act of 1896 was that the tenant purchaser should start clear from the date of his vesting order. This policy is carried out by sections 31 and 35.

(1) 37 I. L. T. R. 176.

Meredith, J. 1906. *In re* Crosbie's Estate.

It is admitted that the land passes discharged from all liability for rent, but it is contended that the personal liability remains. Section 31 says that 'the sale . . . . . shall be made discharged from all superior interests.' If it had stopped there, the personal liability would remain. But it goes on to say that 'such superior interests shall become a lien upon, and be redeemed or satisfied out of, the purchase-money.' The effect of this is to provide a fund to satisfy the charge, and to wholly extinguish the personal liability. The question then is whether an arrear of rent is a 'superior interest.' It is impossible to imagine words more comprehensive than sub-section 8 of sect. 31, and they must be held to include an arrear of rent. The question of interest in lieu of rent is identical. Interest on the purchase-money depends on the equitable conversion consequent on an agreement for sale. Here there is no binding agreement for sale, and therefore no binding agreement to pay interest. The interest paid under the verbal agreement was in reality rent."

If I may be permitted to say so, I adopt respectfully the reasoning of the Lord Chief Baron, and the conclusion at which he arrived.

In my opinion, the 8th sub-section of sect. 24 of the Act of 1903 is an adoption by the Legislature of the principle of the decision of the Lord Chief Baron with a very clearly defined limitation as to the extent to which the principle can be permitted to assume a concrete form in the shape of purchase-money advanced under the Land Purchase Acts. In brief, the sub-section recognises and sanctions the transference to, and inclusion in, the purchase-money of the holding of a sum equivalent to the arrears of rent actually due at the date of the agreement for purchase, but not exceeding in any case one year's rent. I am of opinion that it follows that the parties to the agreement are entitled to take into consideration, when fixing the price and agreeing upon the amount of the purchase-money of the holding, arrears of rent to the extent, and within the limits of, the sub-section, but not further or otherwise; and whether that consideration is given without being expressed, or is entered into openly and above board by landlord and tenant, freely and voluntarily naming a sum within the limits of sub-section 8 to cover arrears of rent and

to be added to or included in the purchase-money of the holding, seems to me to make no difference. There is no fraud upon the statute if the provisions of the statute are adhered to and complied with.

I hold, therefore, that the purchase-money of a holding on an estate within the Act of 1903 may embrace and include a sum equivalent to the arrears of rent actually due at the date of the purchase-agreement, not exceeding in any case one year's rent, and that the Land Commission may advance out of the Land Purchase Fund the sum so indicated as part of the purchase-money of the holding repayable by a purchase annuity.

I answer the questions of law submitted to me as follows:—

In the case of John Neilan, I answer:

1. The entire sum of £59 cannot be included in the advance to be made out of the Land Purchase Fund to the tenant; but the sum of £38, being the amount of one year's rent, portion of the total arrears of rent due to the vendor at the date of the purchase agreement, can be included therein.

2. In the event of the parties applying for the reduced purchase-money, as they are at liberty to do, the answer to this question is in the affirmative.

3. The percentage will be payable on the sum of £38 included in the advance as aforesaid.

4. Having regard to the foregoing answers, this question does not arise.

In the case of Jeremiah Crean, I answer:

1. The entire of the sum of £1015 can be advanced out of the Land Purchase Fund to the tenant.

2. The answer to this question is in the affirmative.

3. The percentage will be payable on the entire of the said sum of £1015.

4. Having regard to the foregoing answers, this question does not arise.

J. E. W.

Appeal. 1907.

In re Crosbie's Estate.

Jan. 15, 28.

The Treasury appealed from the above decisions, and a cross-notice of appeal was served by the vendor against so much of the order as limited the amount of the arrears that might be included in the advance to one year (1).

The Attorney-General (*the Right Hon. R. R. Cherry, K.C.*), *The Solicitor-General* (*Redmond J. Barry, K.C.*), and *Dudley White*, for the appellants:—

Originally in sales under the Land Purchase Acts, there was no reference to rent at all. The Land Commissioners then found that sales were interfered with by arrears of rent. Rules were passed under the Land Purchase Act of 1887 to put an end to all saving of arrears of rent on a sale to the tenants: Rule LV. of December, 1887. But no advance was made under those Purchase Acts until the Land Commission had inspected the holding and ascertained that it was good security for the advance.

By sect. 3 of 51 & 52 Vict. c. 49 all liability for arrears of rent was to cease from the time of the sanction of the advance. That was repealed, and re-enacted by sect. 35 of the Act of 1896.

We submit that sect. 1 of the Act of 1903, coupled with sect. 48 of that Act, provides how the purchase-money of tenancies is to be computed. The Treasury cannot make an advance for anything more than the purchase-money; and the moment we show that something else has been brought in, the contract is void as not within sect. 1. The words of sect 1 are:—"In the case of the sale of an estate . . . when application is made for an advance . . . of the whole purchase-money of a holding, and the Land Commission are satisfied that the tenant is in occupation of the holding." The definition of "holding" is the same as under the Land Act of 1881, and cannot include arrears of rent. The principle of the previous decisions is in favour of our view: *Re Crosbie's Estate* (2); *Re Wills-Sandford's Estate* (3). Part of the purchase-money agreed to be paid was not the price of the holding at all, but is a personal debt. The sole matter about which the parties

(1) In the Court of Appeal, before Sir Samuel Walker, C., and Fitz-Gibbon and Holmes, L.JJ.

(2) [1906] 1 I. R. 515.

(3) [1905] 1 I. R. 597.

can contract is the purchase-money, and this is not purchase-money.

W. M. Jellett, K.C., and *T. H. Maxwell*, for the respondents :—

Up to the passing of the Land Act of 1903, including arrears of rent in the ascertaining of the purchase-money was always considered a lawful transaction. Since the Act of 1903, once the Estates Commissioners have before them an agreement for sale which is within the zones, then—in the absence of fraud—they have nothing more to say to the matter.

By the Land Act of 1870, s. 32, a landlord and tenant might agree to sell at such price as they might agree upon, and the Board of Works might advance any sum not exceeding two-thirds of the price. By sect. 24 of the Act of 1881 the Land Commission might advance three-fourths of the purchase-money ; and by sect. 2 of the Act of 1885 the Land Commission were authorized to advance the entire purchase-money, if satisfied that the security was sufficient. The last stage is sect. 1 of the Act of 1903 : if the sale is within the zones, the Land Commission do not need to inquire about the security. We submit that once the parties have agreed to a sale, if the case is within the zones, and the transaction is *bona fide*, the Land Commission cannot inquire what was in the minds of the parties when agreeing to a sale. Once the landlord and tenant have agreed to a sale of a holding, the landlord's right to recover arrears of rent is gone ; consequently, in almost all cases, the arrears of rent are taken into account in arriving at a purchase price. Moreover, arrears of rent are mentioned in several sections of the Act. By sect. 6 the landlord may sell to the Land Commission, and they may, after inquiry, agree to purchase and sell to the tenants as provided by sub-sect. 2. Section 7 provides for a sale to the Land Commission of an estate in the Land Judge's Court. They offer for the purchase of the estate discharged from all claims, and their offer is to contain the following particulars :—" the arrears of rent which are to be transferred to the Commission " : sect. 7, sub-sect. 2 (*b*) ; and by sub-sect. 5 the order of the Land Judge shall vest in the Land Commission " the right to collect and recover any arrears of rent specified in

Appeal. 1907.

In re CROSBIE'S ESTATE.

the order." By sect. 18 the Land Commission may recover arrears of rent due at the date of the purchase agreement and not remitted, in the same way as instalments of the purchase annuity. In that case the purchase price must be affected by the amount of the arrears of rent, as the purchase-money is, on the face of it, to cover arrears which are due and are not remitted.

Jan. 28.

SIR SAMUEL WALKER, C. :—

The facts of this case are not in dispute. They raise an important question on the application of the 1st section of the Irish Land Act, 1903. Mr. Crosbie, who is absolute owner of his estate, entered into an agreement, dated 2nd June, 1904, with a tenant of his, John Neilan, for the sale of his holding. He at the same time entered into agreements with his other tenants. Neilan was tenant at a rent of £38, fixed by agreement for a second statutory term, dated 6th April, 1904, filed 20th July. The rent for the first statutory term had been £47 10*s.* At the date of the agreement Neilan owed for arrears of rent £228.

The material clauses of the agreement are :—"1. In case an estate of which the said holding forms a part shall be sold under the provisions of the Irish Land Act, 1903, the vendor hereby agrees to sell, and the tenant hereby agrees to purchase, the said holding for the sum of £1034. 2. The tenant hereby applies to the Irish Land Commission for an advance of the sum of £1,034 for the purpose of said purchase, to be repaid by an annuity of £33 12*s.* 6*d.*, payable as by the Irish Land Act, 1903, provided." No question was submitted as to the alteration to £1034 of the original sum named, and, for the purpose of the case, £1034 has been treated as the agreed purchase-money.

Mr. Crosbie has made an affidavit, stating with the utmost candour the negotiations and basis on which the purchase-money of £1034 was arrived at. He says that the basis of sale was that the first-term tenants should receive a reduction of 30 per cent., or 6*s.* in the £1 ; and second-term tenants 20 per cent., or 4*s.* in the £1 ; the half-year's rent then payable either to be paid in cash or added to the purchase-money at the tenant's option ; arrears to be liberally dealt with on the merits of each case. He then says that

every tenant was able to calculate for himself what annual sum would be 6*s.* in the £1, or 4*s.* in the £1, less than his rent, and he knew that the actual annuity he was contracting to pay differed therefrom by reason of the half-year's rent and arrears coming into the calculation. There never was any purchase-money except the one purchase-money, the resultant of the aforesaid calculations.

As to Neilan's case, he says—"This purchase-money was arrived at in accordance with the above terms as follows:—20 per cent. off rent of £38 gave an instalment of £30 8*s.*, representing a capital sum of £935; to this was added £19 for half-year's rent then payable, and £40 in full satisfaction of the arrears of rent then amounting to £228, and the resultant of £994 was the purchase-money."

The Estates Commissioners, for the purpose of raising the question whether the half-year's rent and estimated sum for arrears could be included in the purchase-money for the purpose of an application under section 1 of the Act, have prepared a memorandum containing, amongst others, the following statements. It is admitted that the arrears amounted to £228:—

"It is also admitted that the said sum of £1034 applied for included the sum of £59, part of the said total arrears due by the said tenant at the date of signing the said purchase agreement. The said sum of £1034 amounts to 27·2 years' purchase of the said £38; and if the said sum is advanced, the annuity payable would amount to £33 12*s.* 2*d.*, being less than the present rent by 11·6 per cent."

"The Estates Commissioners have provisionally declared the lands for sale an estate for the purposes of the Act"; and they referred the following questions for the decision of the Judicial Commissioner. [His Lordship read the questions in Neilan's case, *ante*, p. 117.]

The Judicial Commissioner decided that the entire sum of £59 could not be included in the advance, but that £38, one year's rent, could, and that the provisions of section 1 (1) applied to this, and that the percentage would be payable on the sum of £38 included in the advance.

From that decision there has been an appeal and cross-appeal—by the Lords Commissioners of the Treasury, who contended that

Appeal. 1907.

In re Crosbie's Estate.

Sir Samuel Walker, C.

the sum of £59, being arrears of rent, cannot be added to the purchase-money or included in the advance, and that the provisions of section 1 do not apply, inasmuch as the whole purchase-money agreed on cannot be advanced; and by the vendor on the ground that the provisions of section 1 apply to the whole purchase-money agreed on, and that the percentage is payable on the £59. The question before the Court has been rendered material by the enactment contained in the 1st section of the Irish Land Act, 1903. Till then the Land Commission were not bound to make the advance applied for unless they were satisfied with the security; but it is now obligatory to make it in all cases coming within section 1 (1) and (2). That section is in the following terms:—[His Lordship read the section]. The material words to be considered are "holding" and "purchase-money" of the holding.

I think it is desirable to see what the legislation was as to advances before, and when, the Act of 1903 passed, and what was the practice as to estimating purchase-money when arrears of rent were due. We know the several steps by which the power to advance the whole purchase-money was arrived at:—1, the two-thirds under the Act of 1870 legislation; three-fourths under the Act of 1881; and, finally, the whole under the Act of 1885. There is no doubt that the discretion as to the amount provided a security to the State, and the guarantee deposit was a security in the same direction under the Act of 1885; but the material words "holding" and "purchase-money of a holding" were used all through the legislation. Now, it was a settled practice sanctioned by Land Commission forms and rules that arrears were taken into account in estimating the purchase-money, and by agreement of vendor and vendee made to form part of it; and rules and forms of the Land Commission framed on that basis were referred to: and this practice long outlived the time when the agreement for purchase under the Acts of 1888 and 1896 operated as a discharge of all arrears of rent then due.

The same words, "holding" and "purchase-money" or "price," are used in section 1 as in the earlier legislation, and are used in other parts of the same section and Act where confessedly the amount of advance is discretionary.

I am laying out of sight for a moment the consideration

whether the affidavit of Mr. Crosbie has shown in this case that the arrears had not formed, and do not form, part of the agreed purchase-money, and am only dealing with the question whether the inclusion of arrears in the purchase-money takes the case out of the zone section. "Holding" is a parcel of land held under a contract of tenancy. It is a rent-producing subject, which may have arrears attached to it as a liability affecting that holding. When a tenant owes an arrear out of his holding, and asks his landlord to sell it to him, he cannot expect that he would get it for the same price as if he owed none, especially where an agreement for the sale discharges the arrear due. An arrear of rent is not an element foreign to the price, nor can it be considered as a mere personal debt due to the landlord, like the price of goods sold and delivered, or a promissory note. It is a matter which is naturally had regard to where a landlord is parting with the holding to which it is attached. I do not think it possible to contend that a landlord is bound to estimate the price of each holding as if there was no arrear due out of it; and if it is a legitimate subject to be entertained, it is legitimate to consider it in the price. Such a case is wholly distinct from that which arose in *Crosbie's Estate* (1) and *Wills-Sandford's Estate* (2), where the sums added to the purchase-money had no natural connexion with the price, and were introduced with the object of benefiting the tenant and landlord at the expense of the State, the landlord getting the percentage on the agreed addition. This was a fraud on the Act of Parliament; and wherever that element exists, it must be treated as not a lawful part of the purchase-money for compulsory advance or *bonus*. Mr. Jellett pointed out that, under sections 6 and 7, where the Land Commission send in an offer in which the arrears of rent are specified, and they buy those arrears, and are re-selling to the tenants, they must re-sell at a loss, which it is their duty by section 6 not to do, unless they take into account those arrears when re-selling.

The Master of the Rolls, sitting as Judicial Commissioner, founded his judgment entirely on section 24, sub-sect. 8, the benefit of which Mr. Jellett disclaims. I have not been able

(1) [1906] 1 I. R. 515. (2) [1905] 1 I. R. 597.

Appeal. 1907.

In re Crosbie's Estate.

Sir Samuel Walker, C.

to see that this section helps the argument for the Crown. The object *prima facie* of that sub-section was to give an inducement to a tenant for life to sell, discharged of arrears by force of the agreement, by giving him a charge on the purchase-money for one year's arrears. I do not think it helps us in answering what are purchase-money and price under section 1, sub-sects. 1 and 2. There is a presumption created by the statute against the State that the security is sufficient when the elements exist which are specified—the relation of the purchase annuity to the existing judicial rent mentioned. It is obvious, for the application of the section, that the price in question must be *bona fide* part of the purchase-money; and if the affidavit of Mr. Crosbie in the present case shows that the arrears of rent considered and taken into account were not part of the purchase-money, the Crown should succeed; but if the affidavit is only a statement of the mode in which the arrears were taken into account and brought into and made part of the purchase-money, it is only doing what was lawful before the Act in respect of arrears which were a liability on the holding sold, and a factor in determining its value. Upon the whole, I think such is the true construction of the affidavit. It was not contended that, apart from the language of the affidavit, the agreement could be gone behind when a purchase price specified. It follows that the appeal of the Lords Commissioners of the Treasury fails, and that the cross-appeal must succeed, and that the answers to the first three questions submitted by the Estates Commissioners must be in each case—Yes.

It is also clear that the appeal in Crean's case is ruled by what we decide in Neilan's case, and that the answers in it also must be "yes" to each of the first three questions. The last question in each case does not arise.

FitzGibbon, L.J.:—

The only difficulty in this case is that of interpreting Mr. Crosbie's affidavit. It would be possible to include in the "purchase-money of a holding" the price of something which was not part of the holding, and not properly the subject-matter of sale within the Act of 1903, and which, therefore, could not be the sub-

ject of a lawful "advance under the Land Purchase Acts." But the real question—as the Lord Chancellor has indicated—is whether, upon the candid statement by Mr. Crosbie of the mode in which the amount of the purchase-money to be paid by each tenant in the present case was fixed, that amount was honestly ascertained as the price of *the holding* and of nothing else—no other subject-matter being paid for. The contention of the Treasury is, that the arrears of rent, or some definite amount of those arrears, passed under the sale, not as an incident or part of the holding, or of the interest of the landlord in the holding, but as a personal debt or distinct sum of money, which by law, and in fact, ought to have been excluded from consideration in fixing the price of the holding. My answer to that contention is general, but it goes to the root of the matter. I wholly fail to see how the condition of the tenant's rent account, when he buys his landlord's interest, can ever be left out of consideration in the price of the holding. If it be an element affecting the price, then the closing of the rent account becomes part of the consideration for the purchase-money. No doubt, arrears of rent may be considered and dealt with separately; but they are not necessarily a separate subject-matter of purchase and sale, distinct from the lands on which they are due. I regard Crean's case as a *reductio ad absurdum* of the Treasury argument in Neilan's case, assuming, as I do, that in each case there has been a *bona fide* sale of the landlord's entire interest to the tenant for an amount fixed by agreement, as the result of taking all the circumstances of the holding, including the amount of rent due, into consideration.

I take the case by stages. It would be practically impossible to complete a purchase on a gale-day, paying the rent up to that day, and having no rent either due or accruing when the sale was closed. In every case in which the sale is not made on a gale-day, a gale of apportionable rent must be current. Next, we have that peculiar Irish institution "the hanging gale," common but not universal. Crean owed less than a year's rent. Then comes the stage at which the tenant owes a full year's rent, for non-payment of which he is liable to ejectment, or to distress. Lastly, there are many tenants who owe larger arrears, sometimes for many years. On each estate which a landlord agrees to sell under the

Appeal. 1907. *In re* CROSBIE'S ESTATE. Fitz Gibbon, L. J.

Purchase Acts, upon terms fixed upon conference with his tenants in general, there may be tenants who differ as widely in their solvency or their circumstances as in their punctuality of payment. Until the Treasury started the present contention, I never heard that either landlord or tenant imagined that it was material or necessary to deal separately with the rent account, except to see that it was closed by the sale. So far as my experience goes, and I have learned a good deal about Land Purchase Agreements on the "Trinity College Estates Commission" as well as in this Court, the current gale is generally disregarded; where the "hanging gale" exists, it is often "thrown into the bargain"; but in every case *something* goes into the price for the rent due or accruing. When there is more than a full year in arrear, the value of the tenant's interest would be depreciated, if he were selling his holding to a stranger, because of the liability to eviction and distress. In such cases, and where larger arrears are due, on a proposal to sell to the tenants at an "all round" rate, there is generally a collateral stipulation that each tenant shall reduce his arrears *to* a fixed amount, or *by* a fixed amount, by payments on account before the sale. I have met cases—including cases in Kerry—where the landlord required, as a condition of selling, that he should get a certain total sum of money—say, so many years purchase of his net rental. The simplest way of getting that would be to get from each tenant the prescribed number of years purchase of his rent, irrespective of the amount of rent which he owed. But where some tenants owed large sums, while others owed little or nothing, the effect of making them all pay the same number of years purchase would be to raise the price on the solvent or punctual tenant, to make up for the default or the insolvency of the rest. In such cases, is there anything wrong in stipulating that those who, by reason of owing arrears, are in default, shall pay a somewhat higher price as the purchase-money of their holdings, including the release of all liability to rent, past present and future? In some of the cases which came before me, it was agreed that each tenant who owed, say, two or three years rent, should add the amount of one year to the purchase-money, and that those who owed more, even in some cases five or six or seven years arrears, should add the amount of two years;

but in every case the entire claim was satisfied, at the cost to the tenant of a comparatively small diminution of the reduction in the annual instalments as compared with the former rent. The purpose of the Act of 1903 was to enable tenants to buy and landlords to sell, and tenants in arrear, and even evicted tenants, are objects of the legislation. The idea is that each tenant's agreement is to be made voluntarily and independently; but if the Treasury is right, no estate could be lawfully sold for a price into which the consideration of arrears had entered, unless the amount of those arrears was differentiated from the purchase-money of the land, considered merely as a productive agent. No holding can be sold without taking the rent account into consideration, and the segregation of the amount at which the rent account figures in the "purchase-money of the holding" was not contemplated by the statute, and is, in most cases, practically impossible.

Meredith, J., was induced to hold that the effect of sect. 24, sub-sect. 8, was to legalize the addition of not more than one year's rent to the purchase-money. That sub-section has, to my mind, a very different effect: I regard it as an express recognition of the fact that the consideration for arrears of rent may enter into the calculation of the purchase-money; and the object of the section was to enable a limited owner to segregate from the purchase-money—after it had been fixed—a certain proportion which he might keep for himself, as a just recompense for having sold the arrears, which were his, with the holding in which he had only a limited interest. But the limit of the sum to be "paid out of the purchase-money" to a sum equivalent to the arrears, but not exceeding in any case one year's rent, operates only between the limited owner and the remainderman.

I cannot better express my view of the law than by quoting words which the Attorney-General will recognise:—

> "Arrears of rent due may be added to the purchase-money; but as the total amount is the sum upon which the purchase-annuity will be calculated, care should be taken that the price is not thus brought above the higher limit of the zone, *otherwise the Land Commission may refuse to make the advance*" (1).

(1) Cherry, Land Acts, p. 1053.

Appeal. 1906.

In re CROSBIE'S ESTATE.

Fitz Gibbon, L.J.

The object of the Act was to aid the sale of estates (sect. 40 (1)). For this purpose the percentage on the amount of the purchase-money was given; and where that amount gives to the tenant the percentage of reduction specified in sect. 1 (1), Parliament has accepted that material guarantee as sufficient evidence of the security for the advance, and has dispensed with the condition that the Land Commission shall, *in addition*, be "satisfied with the security." Provided always that the sale of the holding is honestly made and carried out for the agreed price, and that there is no fraud or concealment, the Land Commission or Treasury cannot refuse to make an advance which is within the limits prescribed by section 1 (1).

HOLMES, L.J.:—

From the year 1870 to the year 1903 provision was made in successive statutes to enable Irish tenants to purchase their holdings with money advanced by the State on the security of the land purchased. Under the earlier Acts, only portion of the purchase-money could be so advanced; but since 1885 the Land Commission was authorized to provide the entire amount subject to certain conditions, one of which was that the Commission should be satisfied with the security. The purchase contemplated in this legislation was a purchase in which the price was to be fixed by a voluntary agreement between the landlord and the tenant; and inasmuch as since the passing of the Land Law (Ireland) Act, 1896, section 35 (if not before), the agreement, when carried out, discharged the tenant from all liabilities to the landlord affecting the holding, including rent and arrears of rent existing at the date thereof, the amount of such rent and arrears was a natural and important element in ascertaining the purchase-money. If at the date of the agreement there was due rent which the landlord could or might have recovered if he had not agreed to sell, he would expect a higher price than if no such liability existed; and the tenant knowing that the agreement would have the effect of relieving him therefrom, would probably regard the vendor's expectation in this respect as not unreasonable. Accordingly it was, I believe, well known before 1903, that when a landlord was selling an estate, the holdings on which were similarly circum-

stanced in other respects, a difference was made in the price in the case of tenants who owed arrears of rent, recoverable in whole or in part, as compared with the price to be paid by tenants from whom no rent was due.

I come now to the Irish Land Act, 1903, which introduced considerable changes in the then existing legislation relating to State-aided purchase. The change with which we have to deal in this appeal is to be found in section 1. Theretofore a purchase agreement could only be carried out if the Land Commission were satisfied that the holding agreed to be sold would, in the hands of the purchaser, be good security for the annuity charged thereon in repayment of the sum advanced by the State. It thus became the duty of the Land Commission to have the circumstances of the property inquired into and the lands inspected, with the result in many cases of their declining to sanction the advance. The effect of the aforesaid section is, that where the holding agreed to be sold is subject to a judicial rent, the Land Commission is directed to sanction the advance without investigation as to the sufficiency of the security, provided the purchase-money falls within certain prescribed limits. The limits depend upon the extent to which the purchase annuity payable in respect of the advance is less than the existing rent; and holdings to which the provision applies, by the happy use of a familiar word, are popularly described as coming within the "zones." Where such holdings comply with the other provisions of the Land Purchase Code, none of which are material for my present purpose, it is mandatory on the Land Commission to advance the whole of the price. It is, however, to be noted that, under the Act of 1903 as before, the amount of the purchase-money is arrived at by the voluntary agreement of the landlord and tenant, and no change is made in the nature of the contract, or in the property to which it relates.

If, under the law as it existed before 1903, it was legitimate to take into account, in fixing the price, that the landlord would lose the rent in arrear, and that the tenant would be benefited by being relieved from liability thereto, there is nothing to be found in the statute of that year altering the law in this respect. The Attorney-General does not say that there is; but he suggests that

Appeal. 1907. *In re* CROSBIE'S ESTATE. Holmes, L.J.

an irregularity, which might have been overlooked when the advance was only made upon the Land Commission being satisfied that the State was well secured, has become serious when the value of the security cannot be inquired into. This is a consideration to which I attach no weight. It is quite clear that at every period in the history of this legislation money could only be provided for the purchase of the holding. If any part of it was to be applied to a different purpose, such application would be a manifest fraud which it was the duty of the Land Commission to prevent, irrespective of any question of security. For example, if the tenant was indebted to the landlord for a consideration unconnected with his holding, and it appeared that it was a term in the agreement for sale that this debt should be discharged out of the price, I have no doubt that the Land Commission, without inspecting the lands or investigating their value, ought to decline to sanction the advance on the ground of the illegality of the transaction. In such a case as this, the money of the State would be applied not only for the purchase of the holding, but also for paying an independent debt.

Are arrears of rent similar in kind to such a debt as this? If so, the Land Commission, in allowing them to be included in the purchase-money before 1903, were guilty of a breach of duty which the explanation of the Attorney-General may account for, but which cannot be justified or excused. I am satisfied, however, that there was nothing illegal or improper in their sanctioning the advance of purchase-money thus arrived at. No doubt, arrears of rent are a personal debt, for which the tenant can be sued; but they are something more. They are, in the words of section 35 of the Act of 1896, "a liability affecting the holding," which, if not paid, can be used by the landlord as the ground for an action to recover possession of the lands. It is the rental of an estate let to tenants that is the principal—often the only—interest therein which its owner can dispose of. In days not so long departed when landed property in Ireland was freely sold in Court or by private contract, the arrears of rent formed an important element in arriving at the price. As a rule, such arrears were conveyed to the purchaser; and the purchase-money included the value thereof. A sale under the Land Purchase Acts transfers to the tenant the

arrears due by him; and I cannot conceive any reason why the price to be paid by him for the holding ought not to depend to some extent upon the existence and amount of such arrears.

I understand that this is admitted by the Attorney-General, whose argument rests almost altogether on the language of Mr. Crosbie's affidavit. He says therein—"The basis of sale of my estate was stated in this way—First-term tenants to receive a reduction of 30 per cent., or 6*s.* in the pound. Second-term tenants, 20 per cent., or 4*s.* in the pound. The half-year's rent then payable"—meaning, I presume, the rent for the half-year ending next before the date of the agreement—"either to be paid in cash or added to the purchase-money at the tenant's option, arrears to be liberally dealt with on the merits of each case." It is argued that this is an admission that the amount of purchase-money having been first ascertained, the addition made thereto on account of the arrears of rent was something other than and different from purchase-money, and that therefore the advance thereof ought not to be sanctioned. But in determining whether a transaction is honest or fraudulent, legal or illegal, regard must be had to the substance and not to the letter. If the existence and amount of arrears for which the lands and the tenant are liable at the time of the agreement are elements that may be legitimately taken into account in fixing the price of the holding, the mode in which they are taken into account is surely immaterial. Mr. Crosbie in his affidavit has only shown the manner in which the purchase-money was arrived at. It is first calculated on the basis that no rent is due from the holding at the date of the agreement; but if there are arrears, the amount is to be increased by at least one-half year's rent, while anything beyond this is to be dealt with on the merits in each case. Neilan, the tenant referred to in the affidavit, owed six years' rent, amounting to £228, and it was arranged that this liability should be valued at £59 in all, and to that extent the purchase-money was increased beyond what it would have been if there had been no rent due at the date of the agreement. But in substance and reality this increase forms part of the price of the holding, and is not something added to the price.

I have come to this conclusion by applying to sales under the

Appeal. 1907. *In re* CROSBIE'S ESTATE. Holmes, L.J.

Land Purchase Acts the business principles upon which buyers and sellers of land have always acted in this as well as in other countries, and I can find nothing in the legislation on this subject to suggest that any other principle is applicable. On the contrary, there is strong evidence in the Act of 1903 that the purchase-money of a holding is assumed to include compensation for the arrears of rent due out of the lands and extinguished by the sale. Section 7 enables the Land Commission to purchase an estate ordered to be sold in the Land Judge's Court with the view of re-selling the same to the tenants or other persons. The Commission may make an offer for the purchase of the estate, containing particulars of (*a*) the land comprised in such offer, (*b*) the arrears of rent which are to be transferred to them, and (*c*) the amount of the purchase-money. It is, I think, clear that the purchase-money here referred to includes the consideration for the transfer of the arrears of rent; and when the Land Commission re-sells to tenants, it would be extraordinary if the price to be paid by each of them ought not to depend to a greater or less extent upon the amount of arrears he owes. Still stronger in the same direction is section 24, dealing with the distribution of the purchase-money. Sub-section 8 enacts that where at the time of the agreement of sale arrears of rent were due in respect of any holding, a sum equivalent in amount to those arrears, but not exceeding in any case one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use. This provision is made in the interest of a limited owner entitled to arrears of rent at the date of the agreement. If those arrears, as well as the lands, had been bought by the purchase-money, it would be just to declare him entitled to so much thereof as represented the price of the arrears; and the sub-section, I think, can only be accounted for on this assumption. This inference was drawn by Meredith, M.R., in the judgment now under appeal; but he drew the further inference that it must be assumed that the purchase-money did not include more than one year's rent. In this I cannot follow him. Mr. Crosbie has been able in the case before us to show precisely what portion of the purchase-money represents arrears; but in the vast majority of sales no such accurate calculation—indeed, no calculation of any

kind—has been made. The purchase-money, although intended to include arrears, is arrived at as a bulk sum, and an attempt to ascertain its component parts would lead to hopeless confusion. The Legislature therefore thought it convenient, and it is in most cases probably not unjust, to limit to one year's rent the sum which the person entitled to arrears could obtain, even although they may have affected the price to a greater extent. For these reasons, I concur in the judgment of the Court.

Solicitors for the vendor: *Creagh & Byrne.*
Solicitor for the Treasury: *W. M. Lane.*

R. D. M.

IN RE HOLMES' ESTATE (1).

Appeal. 1907. Jan. 16, 28.

Land Purchase Acts—Insolvent estate—Owner of estate also owner of a charge —Percentage under Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48.

H. was the owner of a fee-simple estate, subject to two charges created by the will of a former owner, one of £1330 in favour of H., and the other of £2500 in favour of his sister. An absolute order for sale had been made by the Land Judge, and was in force at the date of the passing of the Land Act, 1903. After the passing of the Act of 1903 the petition for sale was dismissed, and the estate was sold to the tenants under the Land Act of 1903. The purchase-money was insufficient to pay off the two charges:—

Held (by Sir Samuel Walker, C., and FitzGibbon, L.J.; *dissentiente* Holmes, L.J.), affirming the decision of Ross, J., that, having regard to the position of H. as owner of the charge, the vendor was entitled to the percentage under sect. 48 of the Land Act, 1903.

APPEAL from the decision of Ross, J., dated the 21st November, 1906, reported, *ante*, p. 1.

The Right Hon. The Attorney-General, The Solicitor-General, and *Dudley White,* for the Treasury.

Charles A. O'Connor, K.C., and *Redmond Carroll,* for the vendor.

(1) Before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1907.

In re HOLMES' ESTATE.

Jan. 28.

SIR SAMUEL WALKER, C. :—

In this case of *Holmes' Estate* a question arises whether the *bonus* is payable on the sum of £3084 purchase-money advanced by the Land Commission.

The facts are few and simple.

Garner Joseph Holmes devised his estate to Sophia Letitia Holmes, subject to a charge of £1330 in favour of Garner E. Holmes, the respondent, and £2500 in favour of Matilda E. Holmes, the sister of the respondent. On the 29th October, 1885, an absolute order for sale was made on the petition of Garner E. Holmes in the matter of Sophia Letitia Holmes' estate. Sophia Letitia Holmes died, and on the 8th November, 1886, the proceedings were continued in the name of Garner E. Holmes, to whom the estate was limited in fee on the death of Sophia. The absolute order for sale was in force at the date of the passing of the Act of 1903. On the 22nd March, 1904, the estate was taken out of Court, and the petition dismissed, and Garner E. Holmes sold the estate to the tenants for a sum of £3084. He and his sister, to whom together £3830 is due, irrespective of a considerable sum for interest, by deed dated 8th August, 1904, agreed that the purchase-money should be distributed between them in the proportion of the sums respectively due to them, and that the *bonus*, if payable, should be divided between them in equal moieties. Garner E. Holmes is therefore the owner, and he is also interested in the price of the estate to the extent of his charge.

The question depends on the true construction of section 48 of the Act of 1903, as applied to the special facts existing in the present case. [His Lordship read sub-sect. 1.] *Prima facie*, the case comes within that clause, and therefore the *bonus* is payable unless it can be shown not to be payable by reason of the excepting provisions contained in sub-sect. 4. [His Lordship read the sub-section.] Is then the estate so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price? The word "would" refers to a practice as distinct from power, and further I do not think the word "consent" there refers to jurisdiction. I think it refers to a practice of that Court in conducting its sales, which had been intro-

duced by Judge Flanagan, and is shown by *Domvile's Estate* (1) and *Grogan's Estate* (2), and this is fortified by the use of the word "price," which assumes a sale can be had as a matter of jurisdiction, but will not be enforced against the interested person if he can show the price named is one which he can reasonably object to. Ross, J., who has been now some eleven years on the Bench, tells us what the practice is and, anterior to 1896, was. As regards the construction of the section, the decisions of Meredith, J., in *Minhear's Estate* (3), and Ross, J., in *Howlin's Estate* (4) show that the exception created by sub-sect. 4 must be strictly complied with, in order to exclude the operation of the general enactment.

In the latter of these cases, if a general policy that a *bonus* should not be paid in the case of the owner of the estate being insolvent prevails, the decision should have been different from what it was—one undivided moiety to which the vendor was absolutely entitled was insolvent, and the life estate of the vendor in the other moiety was insolvent, but the estate in remainder in this latter moiety expectant on the life estate was solvent—it was held the terms of the exception did not arise. The estate sold was not, as a whole, insolvent, and therefore the *bonus* was payable under the first sub-section.

Another and important question arises on the meaning of the word "owner" in sub-section 4. It is said the "owner" as such is insolvent, and would not be consulted as to price; but when you come to consider whether he would be consulted as to price, I think you must look at him in every capacity in which he would have an interest in the price. If that were not so, it would follow that though he had bought up both these charges, and vested them in a trustee for himself, so that he would get the entire purchase-money, he should not be consulted, because in his character of owner in the strict sense he was insolvent. I do not think that is the true construction of the section. No doubt he must be an owner, but when being such he has a material interest in the price—it may be the dominating interest—I think according to the practice he should be treated as having a voice as to a price being accepted. That is the substance of the matter. He would

(1) I. R. 11 Eq. 1.
(2) [1896] 1 I. R. 614.
(3) 38 I. L. T. 214.
(4) [1906] 1 I. R. 300.

Appeal. 1907.

In re Holmes' Estate.

Sir Samuel Walker, C.

be the person to receive the price when a sale was carried out, and therefore he was a proper person to be heard on the question of price.

I do not think that the words "independently of the Act of 1896" add anything to the argument on either side. They are the same as "independently of this Act" in the 40th section of the Act of 1896, and are pointed to the practice as pre-existing.

It is said that the meaning is that whenever an estate is insolvent no *bonus* is payable; but that assumes the construction of the section in a case like the present to be that the owner in his capacity as such, being insolvent, would not be consulted as to price, though as chargeant and incumbrancer he would be entitled to receive the price. In a question of how the practice of the Court established in *Domvile's Estate* (1) would be applied, I think we must look at substance, and to every character which the owner filled affecting his interest in the subject of price.

I think the decision of Ross, J., was right.

Fitz Gibbon, L.J.:—

Having regard to the nature of the real question in this case, a successful appeal from the Land Judge upon it ought to be almost impossible. It is not a question of either law or fact, but a hypothetical question of what the Land Judge himself would have done if the estate had been brought to a sale "independently of the Act of 1896." It is important to observe that these words are in the Act of 1896, section 40, and are repeated in the Act of 1903, section 48 (4). When the Act of 1896 passed, the present Land Judge was in office, and when the Act of 1903 passed, seven years all but a day afterwards, the practice of his Court had been in his hands all that time, and Parliament, when repeating the same words, must have known that it was sanctioning that practice. We can not reverse the decision of Ross, J., unless we are prepared to hold that we know better than he did what he would have done with an estate so circumstanced. I have not sufficient confidence in my own powers to say that he was wrong, provided that what he did was not illegal.

(1) I. R. 11 Eq. 1.

The estates to which section 40 was intended to apply have been well described as "water-logged" estates. But water-logged ships may be very different in their circumstances, and they can not be justly dealt with indiscriminately. You may have a derelict in such a condition that it may sink at any moment, and the sooner it is sunk the better. On the other hand, many a vessel that has shipped some seas remains a valuable property, capable of being brought safely into port.

Quitting metaphor, the first question for the Land Judge on these sections ought to be—Is the owner, under the circumstances of the estate, interested in the price? The person who is the owner here is directly interested in the price, because the principal if not the only charge on the estate, the payment of which depends on the price, is an incumbrance one-third of which belongs to him, and the other two-thirds belong to his sister, who has joined with him in promoting the sale. The Treasury contends that, because his interest in the price arises from his ownership of the incumbrance, it is illegal to apply section 48. But the section applies, if Ross, J., independently of the Act of 1896, would not have sold the estate without his consent as to price. In 1896, in *Grogan's Estate* (1) Ross, J., quoted the practice from Flanagan, J., in *Domvile's Estate* (2), in these words—

> "It is utterly impossible for me from figures upon paper to form an opinion more than approximately of the real value and selling price of a property. I can, of course, form an idea of it from rentals and valuations referred to; but I never sell property here relying merely on my own judgment, and without consulting the parties whom I consider interested in the proceeds of the sale—that is to say, in cases of incumbered estates, the person representing the incumbrancers, and in cases of perfectly solvent estates, the owners of the estates."

Ross, J., has held that he applies this principle where the owner is interested in the price as an incumbrancer; and if he be so interested, and in that interest be recognized by the Land Judge as having the right to withhold his consent, how can it be said that the estate "would be sold without his consent as to price"? You

(1) [1896] 1 I. R. 616. (2) I. R. 11 Eq. 1.

Appeal. 1907. *In re* HOLMES' ESTATE. Fitz Gibbon, L.J.

cannot force any man to consent, and if his consent would be required, in any capacity, before the Land Judge would accept a price which would damnify him, sub-sect. 4 does not exclude the application of the previous clauses of sect. 48.

There is nothing in the Act of 1896, sect. 40, to compel the Judge to sell at any price which he thinks insufficient. He must offer the estate to the tenants, but only at a price which he thinks reasonable. Section 48 of the Act of 1903 was passed "for the purpose of aiding the sale of estates," by enabling the Land Commission to pay the "bonus" to "the vendor of each estate." The vendor includes—for the purposes of the Act—any owner who is active in promoting a sale, and so circumstanced that his consent would be asked before any specific price is accepted. The owner here was the *dux facti* of the sale to the tenants. No doubt he was the owner of only one-third of the charge, but in that capacity his consent would be asked; and his sister, who owns the remaining two-thirds, has joined with him in promoting the sale. The argument of the Treasury, if good at all, must have prevailed if the owner of the estate had been the owner of the whole incumbrance. But in that case, on the practice of the Court as stated by Flanagan, J., and by Ross, J., the estate would not have been sold without the consent of this incumbrancer as to price, and, therefore, he being the owner, the discretionary power given by sect. 48, to allow the percentage, applies, and I decline to narrow the words of the Act by treating the consent which is required as limited by the special capacity in which the particular person from whom it is required is to give it.

There is nothing to throw the slightest doubt on the *bona fides* of this sale, as one honestly made by an owner who is interested in the price, and whose consent would, under the circumstances, have been asked by the Land Judge, before selling; nor is it suggested that there has been here any arrangement between incumbrancers and an owner who has no interest, or otherwise, to evade the application of sub-sect. 4.

Holmes, L.J.:—

On the 29th October, 1885, an absolute order for the sale of this estate was made by the Land Judge, on the petition of Garner E. Holmes, an incumbrancer, the then owner being Sophia Letitia Holmes, and on her death the proceedings were ordered to be continued in the name of the petitioner as owner. This petition was dismissed by an order of the 22nd March, 1904, since which date the lands have been sold for £3,084 advanced by the Land Commission, pursuant to the provisions of the Irish Land Act, 1903. The incumbrance in respect of which the petition was originally presented was a sum of £1,330, charged on the lands in favour of Garner E. Holmes by the will of Garner J. Holmes, who also charged them with the sum of £2,500 in favour of Matilda E. Holmes, now Mrs. Balston; and these sums, with a large amount of interest thereon, remained unpaid at the time of the sale. There seems to have been no other incumbrance; but after the redemption of superior interests, and the discharge of legacy duty and costs, there was only left for the payment of the two charges something under £1,200. In this state of circumstances the question for determination is whether the percentage mentioned in sect. 48 of the Act of 1903, popularly known as the *bonus*, is payable on the purchase-money.

It is admitted that it would be so payable, if the case does not come within one of the exceptions enumerated in sub-sect. 4, which excludes from the section an estate so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price, and in respect of which an absolute order for sale by the Land Judge was in force at the date of the passing of the Act of 1903. The second of these conditions existed in respect of the estate with which we are dealing; and the result of this appeal depends upon whether the first applies to it. Its language is identical with that used in the Land Law (Ireland) Act, 1896, sect. 40, for the purpose of describing estates in which the Land Judge is directed to give the tenants thereof an opportunity of pre-emption—language that received a judicial interpretation some years ago.

Before considering their meaning, I wish to dispose of two points which seemed to cause some difficulty in the course of the

Appeal. 1907. *In re* Holmes' Estate. Holmes, L.J.

argument. The expression "independently of the Act of 1896" is perhaps somewhat obscure; but I have no doubt that it is equivalent to saying "if the Act of 1896 had not become law." It was intended in fact to bring us back to the practice of the Land Judge's Court previous to that statute. The other point is the meaning of "without consent." Counsel for the respondent, following in this respect Ross, J., treated it as equivalent to "without consulting the owner." But this can hardly be what was intended by the Legislature. The only way in which the Land Judge can consult an owner as to price is by hearing the views of the latter and by considering them. This assumes that he may either accept or reject them. If the owner can stop the sale by saying that he does not consent to the price, there is nothing to consult about. Therefore, I interpret the words as referring to cases where by the practice of the Court the consent of the owner is not a condition precedent to a sale.

I proceed to consider the class of estates that fall within the exception. Now, an unincumbered estate is undoubtedly within it. Where the owner is the only person interested in the sale, the Land Judge ought not, and would not, in accordance with the practice of his Court, sell at all without his consent. It would be his right to have the petition dismissed, and thus put an end to the Judge's jurisdiction. But unincumbered estates in Ireland are few and far between; and in interpreting the 40th section of the Act of 1896, it was held that it was not confined thereto. There are two kinds of incumbered estates—one where the incumbrances will not exhaust the purchase-money, the other where the price will not be sufficient for their payment—in other words, solvent and insolvent estates. In the first class it was not usual for the Court to sell the whole of the estate without the owner's consent. Judge Flanagan in *In re Domvile* (1) explained his practice in this respect. I gather from his judgment therein that in such cases he would only sell so much of the property as would pay off the charges; but as I understand his observations he neither required consent, nor thought consultation necessary, if the estate was insolvent. When section 40 of the Act of 1896

(1) I. R. 11 Eq. 1.

came before Judge Ross in *In re Grogan* (1); and he was called on to interpret the very words now under consideration, he drew this distinction. He says, "According to the practice of the Court an estate would only be sold without the consent of the owner as to price in cases where the equity of redemption was valueless. Therefore I hold that in cases where no receiver has been appointed, and where the estate is solvent, the 40th section does not apply." I am disposed to think that this is what was intended by the Legislature; and as this interpretation has been since acted on, and as I am unable to offer any better solution, I willingly adopt it. Was then the estate of G. E. Holmes solvent in 1903, or in the following year when the petition for sale was dismissed? It is certain that it was not. When it was subsequently sold under the most favourable conditions, and after the redemption of superior interests and the payment of prior charges, there only remained £1200, which, even if it were all applied to the payment of Mrs. Balston's incumbrance, would not discharge one-half of the principal due thereon. Therefore, interpreting sub-section 4 as I have done, I hold that this estate is excluded thereby from the benefit of sub-section 1.

But before parting with the case, I wish to say that there was one matter discussed by counsel on both sides, the relevancy of which I fail to see. They seemed to think that it was important to determine whether the consent mentioned in the sub-section was a consent to be given by a person in the capacity of owner, or in his capacity as an individual having some other interest in the lands. I think it is quite unnecessary to consider on the present occasion this metaphysical distinction, for no matter in what capacity I regard G. E. Holmes, the estate was so circumstanced that it could have been sold under the absolute order for sale without his consent. He had no doubt a charge on it of £1330 ranking *pari passu* with that of Mrs. Balston. But, as I understand the practice of the Land Judge's Court, she could have insisted upon the property being sold for the best price attainable, whether her brother consented or not. No doubt he would be consulted as to the price in the sense I have already pointed out,

(1) [1896] 1 I. R. 613.

Appeal. 1907.

In re HOLMES' ESTATE.

Holmes, L.J.

and if he could show that by a little delay a higher offer could be obtained, an opportunity would be given to try to secure such offer; but if his sister required the estate to be sold for the purpose of realizing her incumbrance in so far as the purchase-money would go, it is a new doctrine to me that he could effectually bar a sale by refusing his consent to the price.

I regret that I am obliged to dissent from the judgment of the Court; but as the question is of great importance, and is not unlikely to arise in other forms, I have thought it right to state at a little length the grounds of my opinion.

Solicitors for the vendor: *Meldon & Co.*
Solicitor for the Treasury: *W. M. Lane.*

R. D. M.

Appeal. 1907.

Jan. 16, 28.

IN RE CARROLL'S ESTATE (1).

Land Purchase Acts—Estate sold insolvent as to capital and income—Order for sale in force at passing of Land Act of 1903*—Portion of estate purchased solvent as to income—Percentage under sect.* 48 *of Irish Land Act,* 1903 (3 *Edw.* 7, *c.* 37), *payable to vendor.*

At the date of the passing of the Land Act, 1903 (3 Edw. 7, c. 37), an absolute order for sale by the Land Judge was in force in respect of the estate of O., which was then insolvent both as to capital and as to income. In 1904 a portion of the estate was sold by the Land Judge to C., who re-sold the same to the occupying tenants, under the Act of 1903. The estate in the ownership of C. was solvent as to income; but, on a sale by C. to the tenants, the purchase-money, after redemption of superior interests, proved insufficient to discharge the redemption value of a Board of Works loan:—

Held (affirming the decision of Ross, J.), that the percentage on the purchase-money under section 48 of the Land Act, 1903, was payable to C.'s executors.

APPEAL from the decision of Ross, J., dated 14th November, 1906, reported [1906] 1 I. R. 661.

(1) Before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

The Right Hon. The Attorney-General, The Solicitor-General, and *Dudley White,* for the Treasury.

Appeal. 1907.

In re CARROLL'S ESTATE.

H. D. Conner, K.C., and *Norwood*, for the vendors.

SIR SAMUEL WALKER, C. :— Jan. 28.

As regards the appeal in *Carroll's Estate*, it seems to me really unarguable when the facts are stated.

There was an estate being sold in the Land Judge's Court called Ottley's Estate, consisting of several lots, including the lands of Rockfort, with which the appeal is conversant. Joseph A. Carroll had a mortgage for £6,000 on all Ottley's lands. All were sold by the Land Judge except Rockfort, and this was so circumstanced that it could not be easily sold. The lots sold did not produce enough to pay Carroll by a sum of about £300, and he, considering it most for his interest, bought Rockfort, and obtained a regular conveyance of it.

After he got his conveyance, and while absolute owner, he sold Rockfort to the tenants for a sum of £2,650, all of which was advanced by the Land Commission. His executors claimed, before Judge Ross, to be paid the *bonus* on the purchase-money. Judge Ross decided that a *bonus* was payable, and an appeal has been taken by the Treasury and sought to be sustained in this way :—It is said this was Ottley's Estate, and it was wholly insolvent, and was so circumstanced then that it would be sold without the consent of Ottley as to price, and an absolute order for the sale of it was in force at the date of the passing of the Act of 1903, and, therefore, no *bonus* can be ever payable in respect of those lands, though then bought by Carroll, and afterwards sold by him to the tenants. In other words, that "Estate" in subsect. 4 means the lands, and not the interest of the owner in the lands.

Ross, J., in his judgment, puts the matter unanswerably. He says :—"In 1903 it was the estate of Ottley ; but when it gets into the hands of a subsequent purchaser, Carroll, it is not *the estate* but a different estate. It is the interest of Carroll in lands which were formerly Ottley's, whose interest, and not Carroll's, was the subject of an absolute order for sale. I cannot hold that this is a blot on

Appeal. 1907. *In re* CARROLL'S ESTATE.

the lands, preventing for ever the *bonus* from being paid. In the case of a new purchaser he requires an inducement to sell to his tenants, and the contention of the Crown, that no *bonus* is payable, must fail."

Sir Samuel Walker, C.

I entirely agree that if the Crown's construction of section 48 were right, the 48th section would furnish an obstacle instead of an aid to land purchase in favour of tenants.

FITZ GIBBON, L.J. :—

The necessary consequence of the argument on behalf of the Treasury would be that no estate, as to which an absolute order for sale existed at the date of the passing of the Act of 1903, and which was then insolvent, could get the benefit of the *bonus*, no matter on what terms the subsequent owner, who agreed to sell it to the tenants, might have acquired it, or how solvent it might be at the time of sale. It amounts to this—that by the terms of section 48 (4) a certain portion of the area of Ireland was for ever excluded from the benefit of the prior clauses of the section.

Let me point out a further consequence. No tenant, or no syndicate of tenants, or no purchaser desiring to buy for the benefit of tenants, could purchase any insolvent estate for the purpose of re-selling it with the aid of the percentage provided by section 48. No matter what was in the minds of the parties, desired, or intended, no matter what were the circumstances or the consequences, no matter what changes might subsequently have taken place, to the end of time it would be impossible and illegal to give to any land included in the proscribed area any share of the benefit which the Act intended "for the purpose of aiding the sale of estates."

In my opinion the contention of the Treasury is unarguable, and it is not the fault of the Law Officers that I remain of that opinion.

HOLMES, L.J. :—

This case is wholly different in its facts from that of the *Estate of Holmes* (1), in which judgment has just been given;

(1) *Ante*, p. 139.

and presents to my mind no difficulty. The petition for sale in the last case was dismissed out of Court in the year 1904; and the estate then vested in Mr. Holmes, and subsequently sold by him under the Irish Land Act, 1903, was the same estate in respect of which an absolute order for sale by the Land Judge was in force at the date of the passing of that Act. Therefore, one of the conditions in the clause in sub-section 4 of section 48 then under consideration was fulfilled. The discussion turned altogether on the meaning of the other conditions—that is to say, whether the estate was so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner. Here the order for sale in 1903 was for the sale of the estate of George Samuel Ottley, and this estate was sold and conveyed by the Land Judge to Joseph H. Carroll, an incumbrancer thereon. The estate thus vested in the purchaser, and subsequently sold by him for money advanced by the Land Commission pursuant to the provisions of the Act of 1903, was not the estate for which an absolute order for sale by the Land Judge was in force at the date of the passing of that statute. Therefore, it does not come within the exceptions mentioned in sub-section 4 of section 48.

Solicitors for the vendors: *W. Guest Lane & Co.*
Solicitor for the Treasury: *W. M. Lane.*

R. D. M.

Appeal.
1906.

Nov. 30.
Dec. 2, 3, 4, 17.

BRADSHAW AND FALCONER *v.* URBAN DISTRICT COUNCIL OF BRAY (1).

(1906. No. 515.)

Housing of the Working Classes Act, 1890—*Public Health (Ireland) Act*, 1878—*Local Act—Purposes of—Deposit of plans—Extent of incorporation—Basis of compensation—Modification of plans—Injunction—53 & 54 Vict. c.* 70, *Part III*—41 *&* 42 *Vict. c.* 52—63 *&* 64 *Vict. c.* cxcii (*L. & P.*)—*Compulsory purchase.*

Prior to the passing of a Provisional Orders Confirmation Act, empowering the defendants to acquire compulsorily from the plaintiffs and from others certain lands, for the purposes of Part III. of the Housing of the Working Classes Act, 1890, and for the purposes of the widening, opening, enlarging, and otherwise improving certain streets and roads within the town of Bray, plans of the lands to be taken, one of which showed a ground-plan of forty-five cottages proposed to be built, a proposed "playground," and a proposed approach 50 feet wide, were duly deposited with the Local Government Board and in Parliament. Section 1 of the Provisional Order in question, which recited the deposit of the plans, described the lands to be compulsorily acquired as "the lands, easements, rights of way, and other premises described in the deposited plans and book of reference"; and the plans were referred to as "the plans showing the lands and premises required for the purposes aforesaid." The Act did not further or otherwise refer to the plans, and did not contain any provision requiring the defendants to carry out the works according to the plans. After the passing of the Act, the arbitrator appointed by the Local Government Board assessed the compensation to be paid to the plaintiffs for purchase-money, and for injury to adjoining lands, and the amount awarded was paid. Subsequently, modified plans for the building upon the acquired lands of a larger number of cottages, the use for that purpose of part of the space marked "playground," and the making of a 20-foot, instead of a 50-foot, approach, were prepared by defendants and approved of by the Local Government Board, through whom the defendants were borrowing money for the carrying out of the works.

On an application for an injunction to restrain the carrying out of the modified plans:—

Held, by the Court of Appeal (affirming the order of Barton, J.), that the

(1) Before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

only restriction on the use of the lands compulsorily acquired by the defendants was that they should be used for the purposes of Part III. of the Housing of the Working Classes Act, 1890, and also for the purpose of widening, opening, enlarging, and otherwise improving the said streets and roads in the town of Bray; that whilst observing such purposes, the defendants were not bound to adhere to the deposited plans; and that the plaintiffs' claim for an injunction should be dismissed.

APPEAL by the plaintiffs from the decision of Barton, J., reported [1906] 1 I. R. 560, where the facts are stated.

Matheson, K.C., Jellett, K.C., and *Dickie*, for the appellants.

S. L. Brown, K.C., Ignatius J. O'Brien, K.C., and *P. A. O'C. White*, for the respondents.

The judgment of the Court of Appeal was delivered by—

HOLMES, L.J. :—

The defendants in this action were authorized by a Provisional Orders Confirmation Act, passed in the year 1900, to acquire, by compulsory purchase under the Lands Clauses Acts, certain lands, easements, rights of way, and other premises in the town of Bray, described in plans and a book of reference deposited as a condition precedent to obtaining the Provisional Order from the Local Government Board confirmed by the statute referred to. This Provisional Order was applied for by the defendants in consequence of their having adopted Part III. of the Housing of the Working Classes Act, 1890; and the several steps prescribed by section 203 of the Public Health (Ireland) Act, 1878, incorporated therewith, were duly followed by the defendants and the Local Government Board before such Order was made. The lands and premises which the defendants were authorized to acquire by the confirming Act included an open space called Purcell's field, with two small adjoining plots and the approach thereto, consisting of a narrow lane with some adjacent cottages, all the property of Mrs. Adelaide Tickell, who was awarded, at an arbitration under the Public Health and Lands Clauses Acts, the sum of £1129 for the lands taken, and £360 for damage by severance and other injury caused to her adjoining and neighbouring property.

Appeal. 1906.

BRADSHAW v. BRAY U.D.C.

Holmes, L.J.

Subsequently these sums were paid to the plaintiffs in the present action, who are the trustees of Mrs. Tickell's will; and who, on such payment, conveyed her interest in the premises to the defendants. Although the confirming Act was passed in 1900, no work has been begun upon the lands acquired thereunder up to the present time; and it was even necessary to enforce by litigation payment of the compensation awarded by the arbitrator. It has not been argued that there is any obligation on the defendants to carry out any plan or to do any work; and if they had remained wholly quiescent, no proceedings could have been taken against them. But recently they have indicated an intention to use the premises in a way for which the plaintiffs contend there is no statutory or other authority. Hence the present action which was disposed of by Mr. Justice Barton, on a motion for an interlocutory injunction, the parties consenting to treat such motion as the hearing of the cause.

The Provisional Order recites the deposit by the Sanitary Authority of plans and a book of reference showing the lands and premises required for the purposes of Part III. of the Act of 1890, to which I have already referred, and for the purpose of widening, opening, enlarging, and otherwise improving certain streets and roads within the town of Bray; and it authorizes the defendants to exercise compulsory powers of purchase with respect to the lands, easements, rights of way, and other premises described in the deposited plans. There is no doubt that one of these drawings represents a ground-plan of forty-five cottages round three sides of Purcell's field, the centre of which is marked "playground," and a proposed approach from the main street, 50 feet in breadth. It is admitted by the defendants that they do not now intend to carry out the work thus represented. They propose to build on Purcell's field fifty-two houses instead of forty-five, and to erect the greater part of them in the form of a street, upon a portion of the space marked "playground" on the plan. Furthermore, they assert that although there is no present intention to place more cottages on this site, it is contemplated to erect thereon at some future time two additional rows of houses. They have also decided to make, at least for the present, the approach only 20 feet wide instead of 50. To these alterations of the under-

taking as appearing on the deposited plans, the plaintiffs object; and this suit has been brought for the purpose of having the defendants restrained from making the contemplated deviations.

The argument on the appeal has taken some time; but in the view I take of the case I do not think it necessary to deal with most of the topics at any length, and to some of them I shall not refer at all. The result of the suit depends, in my opinion, on the construction of the Provisional Order. The plaintiffs' counsel seem to think that it is enough to show that the deposited plans are incorporated in the confirming Act. But the true question is, To what extent and for what purpose are they so incorporated? The recitals of the Order set forth its purposes as I have already stated them, and refer to the deposited plans as showing the lands and premises required for those purposes. The only other reference to the plans is in the provision relating to the compulsory powers of purchase which are conferred with respect to the lands, easements, rights of way, and other premises described therein. I can find nothing in the language of the Act restricting the use of the lands when acquired, except that they are to be used for the purpose of Part III. of the Act of 1890, and also for the purpose of widening, opening, enlarging, and otherwise improving certain roads or streets within the town. Turning to Part III. of the statute referred to, I find that section 59 authorizes the Urban Council to erect any buildings suitable for lodging-houses for the working classes on any land acquired by them.

Certain portions of the Public Health Act and Lands Clauses Acts are incorporated in the Provisional Order; but no section has been quoted therefrom prescribing that in carrying out the purpose for which lands are acquired, adherence to the deposited plans of the undertaking is to be observed. The contrast in this respect between these enactments and the Railways Clauses Consolidation Act, 1845, and the Waterworks Clauses Consolidation Act, 1847, as well as the reason for the difference, is well pointed out by Mr. Justice Barton. Mr. Matheson has shown that under section 203 of the Act of 1878, the first step towards obtaining the Provisional Order is an advertisement containing amongst other things the name of a place where a plan of the proposed undertaking may be seen at all reasonable times; and I assume that the same or a similar plan

Appeal. 1906. BRADSHAW v. BRAY U.D.C. Holmes, L.J.

must accompany the petition to the Local Government Board, and be lodged with Parliament pursuant to Standing Orders. Mr. Matheson argues that this plan may have influenced interested parties in their action at the local inquiry that followed the petition, or the Board itself in the conclusion arrived at. I am, however, unable to hold that what preceded an enactment can affect its constitution. To do so would encourage the idea, sometimes presented to us, that in interpreting a statute we may have regard to the debates and declarations that accompanied its progress through Parliament. To do so would be repugnant to well-settled legal principle; nor is there any grievance in holding that in private bill legislation, such as we have to deal with here, Courts ought to follow the rule applicable to public enactments. The Local Government Board, of its own motion, or at the instance of anyone interested, might in their Order have provided that Plan No. 1 of the proposed undertaking was not to be deviated from; and a similar provision might have been introduced into the statute. Had the confirming Act passed in this form, the position of the plaintiffs would be clear, and there would be no answer to their claim for the injunction asked for. But we have to deal with the Act as we find it; and the only restriction on the use of the lands conveyed by the plaintiffs is that such use must be for the purposes of Part III. of the Act of 1890, and for the purpose of widening, opening, enlarging, and otherwise improving certain streets or roads within the town of Bray.

This brings me to an argument upon which Mr. Matheson laid special stress, but which seems to me to rest upon a manifest fallacy. He says that two purposes are disclosed in the Order—the first under the Act of 1890, the second under section 38 of the Public Health (Ireland) Act, 1878, which enables an urban authority to purchase any premises for the purpose of widening, opening, enlarging, and otherwise improving any street. So far I agree; and I also agree that if a statute authorized the acquisition of one parcel of land for one purpose, and of another and different parcel for another purpose, each parcel can only be used for the purpose indicated in reference thereto. The point at which I differ from counsel is that it is not shown in the present case

that any definite part of the land acquired is to be applied to one of the purposes rather than the other. This can only be done by assuming that the part of Purcell's field described on the plan as "playground" cannot be built on; but this assumption presupposes that the defendants cannot deviate from the plans—the very point upon which the plaintiffs' case depends. If the defendants can only erect buildings on the sites shown on the plan, the plaintiffs ought to succeed; but if, notwithstanding the plan, the defendants are entitled to build lodging-houses suitable for the working classes anywhere on the lands, the point relied on begs the question. The second purpose is merely ancillary to the first. Houses cannot be used unless there is some mode of approaching them; and when one of the purposes declared in the Act is to build houses, the power to open streets or roads is necessarily also given; but the line of such streets or roads will depend upon the sites selected for the houses.

Having given the enactment the construction I have stated, little more remains to be said. The law is clear. A substantial deviation from the purpose specified in the Act will be restrained at the suit of the person whose land has been compulsorily taken, whether such deviation causes him pecuniary loss or not; but, where the purpose is adhered to, the fact that he has sustained greater damage in carrying out such purpose than was present to his mind when compensation was assessed, is no ground for an injunction. It will of course be understood that this rule does not apply to a case where what is proposed by the undertakers would constitute or create a nuisance not contemplated by the statute; but this question does not arise here.

For this reason, it is unnecessary for me to decide whether greater compensation ought to have been awarded by the arbitrator, if the change in the mode of building now contemplated had been made known before the award. I may, however, say that I should find it very difficult to come to this conclusion on the evidence before the Court. The sum awarded must be taken to cover the value of the land taken and the loss, actual and prospective, arising from its severance from the adjoining property of the plaintiffs. I have not had the advantage of visiting the place. Mr. Justice Barton's experience, as well as the photographs

Appeal. 1906. BRADSHAW v. BRAY U.D.C. Holmes, L.J.

produced, would have been sufficient to deter me if I had any inclination to do so. I gather from these sources of information that its present state, which is, I understand, somewhat better than its state at the date of the award, is exceptionally unattractive. I do not doubt that the erection of tidy houses round the place called "playground" on the plan, with an approach 50 feet wide, would be for the benefit of the adjacent premises; but it is admitted that the defendants are not bound to carry out either this or any other work on the acquired land. They are at liberty to keep it as they got it; and, in any case, the improvement to which I refer—what is called in compulsory purchase "betterment"—ought not to be, and I assume was not, taken into account in assessing compensation. The change now proposed will doubtless be less of an improvement to the adjoining premises than what was originally contemplated; but those premises will still derive some advantage from the undertaking in its new shape. The only positive objection to the alteration, relied on in this Court, is that it tends to increase the number of houses in Purcell's field; but I understand the case of the plaintiffs to be that the adjoining lands ought to be used for residences of a wholly different kind with which the defendants' cottages are not likely to come into competition. For these reasons I should be disposed, if the question of deterioration in value were material, to find it against the plaintiffs; but, as it seems to me to be irrelevant, I rest my judgment on the construction of the Provisional Order, and the consequences that follow therefrom. I may add that I have considered the authorities referred to during the argument; but they throw no light on the present case. They establish, as a principle of law, that lands acquired by compulsory purchase under a statute for one specified purpose cannot be used for another; but if my view of the Order and confirming Act in this case is right, there is no intention to depart from the purposes therein declared. The appeal must therefore be dismissed.

Solicitors for the appellants: *Redington & Sainsbury.*
Solicitors for the respondents: *Hamilton & Craig.*

R. ST. J. C.

IN THE MATTER OF THE ESTATE OF MARTHA BUTLIN.

Wylie, J.
1907.
Jan. 15, 21.

Merger—Testator entitled as equitable tenant for life, with contingent remainder in fee, to lands subject to a charge which, subsequently to date of will, became vested in him—Codicil—Intention—Direction to sell—Devise of "principal sum to be realized by the sale."

Under a settlement, made in 1871, J. P. was entitled, as equitable tenant for life, to certain lands, with remainder in fee in the event of his dying without issue, subject to the interposed life estate in his wife. At the time of the settlement the lands, which were held under a Church lease, which, in 1873, was converted into a grant in fee, were subject to a charge vested in A. I. In 1878 J. P. made his will, wherein, after reciting that, by his marriage settlement, he had given his wife a life estate in the lands, he proceeded as follows:—"But if it please Providence that I leave no child, then, from and after the decease of my said wife, I will, bequeath, and direct that the said lands . . . shall be sold . . . , and I hereby leave and bequeath the principal sum to be realized by the sale of said property to . . . the . . . bishops of the diocese of O. . . . and to their respective successors, . . . in trust to and for the following uses," &c. A. I. died in 1879, having by her will bequeathed the charge on the said lands to J. P., who, as her sole executor, obtained probate. Subsequently J. P. executed three codicils to his will, by each of which he disposed solely of sums of Government Stock, leaving them to his wife for life, and after her death to the bishops, on the trusts declared in his will. J. P. died in 1884. On a question subsequently arising as to whether the charge was still a valid and subsisting charge:—

Held, (1) that, on the evidence, the inference to be drawn was that the testator intended the charge to merge; and (2) that, apart from this question, the words in the will, "principal sum realized by the sale," were sufficient to pass the entire net proceeds of sale, including the charge.

HEARING of objection by the vendor to the final schedule of incumbrances.

By indenture of settlement, dated the 9th February, 1871, and executed on the marriage of the vendor with her first husband, John Power, the lands of Ennisnag and Lawcus, situated in the barony of Shillelogher, and county of Kilkenny (being the lands sold in this matter), then held under a Church lease for twenty-one

Wylie, J. 1907.

In re Butlin's Estate.

years from the 25th December, 1868, customarily renewable, were conveyed to the trustees therein named, subject to a charge of £950 and interest secured thereon, then vested in Anne Innis, and to the payment of the head-rent reserved by the said lease, and yearly fines for renewal, and the interest on the said charge, in trust to pay the net rents and profits thereof to the said John Power for life, and, after his death, to his wife, the vendor, for life, in case she survived him, and after the death of the survivor, but subject to the said debt of £950, and the charge and security for the same, in trust for the issue of the marriage as therein provided, and in default of children, in trust for the said John Power, his executors, administrators, and assigns.

On the 21st April, 1873, John Power obtained a grant of the said lands from the Commissioners of Church Temporalities in Ireland, to himself in fee, under the Church Acts, subject to the yearly rent of £157 15*s.* 6*d.*, variable as therein provided.

On the 27th February, 1878, John Power made his will, whereby he directed certain parts of his property to be sold, and after payment of his debts, &c., he gave the residue of the proceeds of the sale to his wife absolutely ; and after reciting that by his marriage settlement he had given his wife a life-interest in the lands of Ennisnag and Lawcus, and made provision for the children of the marriage, should there be such, he proceeded as follows:—" But if it please Providence that I leave no child, then, from and after the decease of my said wife, I will, bequeath, and direct that the said lands of Ennisnag and Lawcus (which I hold in perpetuity) shall be sold by public sale and competition, and I hereby leave and bequeath the principal sum to be realized by the sale of said property to the Right Rev. Patrick F. Moran, and the Right Rev. Robert Gregg, the present Roman Catholic and Protestant Bishops of the Diocese of Ossory . . . and to their respective successors . . . in trust, to and for the following uses, trusts, and purposes, that is to say, to invest the said principal sum in their joint names, as such Bishops aforesaid, in 3 per cent. or other Government Stock, and the annual interest and dividends thereof and arising therefrom, to be divided between the said two Bishops for the time being, and their respective successors, in equal shares," to be applied for certain specified charitable

purposes. Testator appointed his wife sole executrix and residuary legatee.

Anne Innis, in whom the charge for £950 was vested, died on the 8th of June, 1879, having by her will, dated 31st May, 1879, bequeathed the said charge, amongst other property, to John Power, who, as sole executor therein named, obtained probate on the 3rd July, 1879.

Subsequently, John Power executed three codicils to his will, by which he disposed solely of sums of Government Stock acquired since the date of his will. By the first codicil, dated 14th February, 1880, the testator, after reciting that he was then possessed of, and entitled to, a sum of Government Stock, directed that the dividends thereon should be paid to his wife for life, and after her death that the capital sum should be transferred to, and invested in the names of, the two Bishops, to be held by them in trust for the same charitable purposes as were declared in the will. By the second and third codicils, dated 6th November, 1880, and 18th September, 1883, respectively, the testator disposed of further sums of Government Stock in the same manner.

The testator died on 19th November, 1884, without having had any issue, leaving his wife him surviving. She, thereupon, entered into receipt of the rents and profits of the lands, and subsequently sold the same to the occupying tenants under the Land Purchase Acts.

By her objection the vendor claimed to be placed on the final schedule as an incumbrancer for the sum of £950.

Garrett Walker, K.C., and *W. G. Gibson*, in support of the objection :—

The date on which John Power made his will is the crucial date for the purpose of ascertaining his intention. The charge was not vested in him at the time. There is no subsequent act or document indicating an intention that the charge should merge. You cannot speculate as to his intention in the codicils, which dealt solely with sums of stock acquired subsequently to the date of the will. In the case of a tenant for life, the presumption is against merger : *Forbes* v. *Moffatt* (1) ; *In re Godley's Estate* (2).

(1) Tudor's Leading Cases (1898 ed.), p. 244. (2) [1896] 1 I. R. 15.

Wylie, J. 1907. *In re* Butlin's Estate.

We rely on the principles laid down in *Dixon* v. *Rowan* (1) and *Wilkes* v. *Collin* (2). Where merger has been presumed, the testator has used some such words as "all my estate and interest in the lands": *Mackesy* v. *Mackesy* (3); *Kilkelly* v. *Powell* (4).

George Green, for the Commissioners of Charitable Donations:—

The inference to be drawn from the absence of any mention of the charge in the codicils, made at a time when the testator was aware that he had become entitled thereto, must be that he intended it to merge. Apart from the question of merger, the clear intention of the testator, as shown by the will and codicils, was to give his wife a life interest in the lands and the accumulations thereof and, subject to her life estate, that they should go for specified charitable purposes. The charge must be taken to have been disposed of by the bequest of "the principal sum to be realized by the sale of said property."

Jan. 21.

Wylie, J.:—

In this case Martha Butlin, the vendor, has lodged an objection to the final schedule, claiming to be placed thereon as an incumbrancer for the sum of £950, under the following circumstances [His Lordship stated the facts]. In this state of facts the question has now been raised, Who became entitled to the charge of £950 on the death of John Power? Had the charge merged in the lands, and did it pass under the devise of the lands in the will? or did it remain a charge unmerged and vested in John Power, at his death, and did it pass under his will to his wife as residuary legatee, or under the devise and bequest in the will disposing of the lands of Ennisnag?

The only question really discussed by counsel for the objector and the Charity Commissioners in their arguments was, Merger or no merger? Very little, if anything, was said as to whether the charge could pass under the devise in the will of the lands of Ennisnag.

(1) 9 Ir. Ch. R. 365.
(2) L. R. 8 Eq. 338.
(3) [1896] 1 I. R. 511.
(4) [1897] 1 I. R. 457.

Now, dealing first with the question of merger, what was the position of John Power, as regards the lands in question, at the time he became entitled to the charge as legatee under the will of Anne Innis? Under the settlement of 1871 he was equitable tenant for life of a Church lease for twenty-one years, from the 25th December, 1868, renewable by custom, the legal estate for the residue of the term being in the trustees of the settlement. He was also entitled, after the wife's life interest, in case she survived him, and in default of issue becoming entitled to the lands, to the absolute equitable interest under the lease.

Now, in Preston on Conveyancing, as quoted in *Dixon* v. *Rowan* (1), it is laid down that "a person who has a limited interest, consisting of an estate for life and of a remainder or reversion in fee, subject to interposed estates in other persons, will be considered only as tenant for life," with reference to the merger of a charge. And, therefore, in dealing with the question here, John Power must be considered as tenant for life only, unless his position is altered or affected by the grant made to him in fee by the Church Commissioners in 1873. The trustees of the settlement, in whom the legal estate for the term was vested, were not parties to that grant, and although John Power took the legal fee under the grant, it was subject to the legal estate for the term vested in the trustees, and, of course, in equity he was still only tenant for life with an ultimate remainder in fee.

Now, in the case of a tenant for life, it is well settled that if he buy up, or pay off, or otherwise become entitled to a charge affecting the fee, and nothing more appears, there is *prima facie* no merger. He need not say or do anything in order to keep it alive. But the doctrine of merger rests on the expressed or presumed intention of the person entitled to the lands and the charge, and, as laid down in *Swinfin* v. *Swinfin* (2) in an often-quoted passage—"All the acts of the person so entitled, prior to his decease, must be taken into account for the purpose of ascertaining his expressed intentions, if any such exist, and all the facts affecting his position down to, and at the time of, his decease, must also be taken into consideration for the purpose of ascertaining from

(1) 9 Ir. Ch. R. 375. (2) 29 Beav. 199.

Wylie, J. 1907.

In re Butlin's Estate.

them the intentions of the testator to be presumed from the position in which he stood."

Now, there is no evidence whatever in this case of any expressed intention on the part of John Power; and it is obvious that no intention one way or the other can be inferred from the will itself, inasmuch as, at the time he made it, the charge was not his, but was then vested in Anne Innis, and if John Power had died before Anne Innis, the devise of the lands by his will would have been subject to the charge. The only evidence suggested in the case from which an intention to merge could be inferred, are the contents of the three codicils executed by John Power, after he became entitled to the charge, taken in conjunction with the then existing will which the codicils confirmed. What was the effect of these codicils? Each of them had the effect of republishing the will as of the date of the codicil. The first codicil begins—"This is a codicil to the within will, dated 27th February, 1878, of me, the within-named John Power. Whereas I am now possessed of, and entitled to, the sum of £1422 7*s.* 6*d.*, 3 per cent. Government Stock"; then, after leaving the stock to his wife for life, and after her death to the two bishops, who were the trustees of the will, upon the same trusts as were declared in the will regarding the principal sum realized by the sale of the lands, he says—"in all other respects, I confirm my said will." Now, when he made that codicil, he was owner of the charge of £950 secured upon the lands devised by the will; he was the sole executor of the will under which he became entitled to the charge, and in the month of July of the previous year, he had proved the will. Therefore, when making the codicil, he must have had present to his mind his will of the 27th February, 1878, and the provision therein directing the lands of Ennisnag to be sold after his wife's death, and leaving the principal sum produced by the sale to the two bishops for charitable purposes. And is it reasonable or possible to suppose that he had not in his mind also the fact that he had, since the making of his will, become entitled to the charge of £950 secured upon the lands directed by the will to be sold. Now, if he did not then intend that charge to merge in the lands, and to pass to the two bishops as part of the "principal sum to be realized by the sale," would you not expect

the codicil in which he recites—"whereas I am now possessed of a sum of £1422 7*s.* 6*d.*, 3 per cent. Government Stock," and disposes of it, on the same trusts as in the will, would contain a further recital—"and whereas I am also now entitled to a charge of £950," and a disposition of it on the same trusts? Does not the absence, under the circumstances I have stated, of all reference in the codicil to the charge of £950, afford some evidence of an intention to merge the charge? And is not the inference of such intention much strengthened by the fact that, on two subsequent occasions when he had acquired a small sum of Government Stock, he executed a further codicil disposing of it on the like trusts, showing thereby a general intention, on his part, to give his wife a life interest in all his property, and after her death, to give it all to the two bishops for the charities indicated in the will. By merging the charge, the wife got a life interest in it. The only other inference that can be drawn is, that while the testator was careful, by the three codicils, to give the wife only a life interest in the several sums of money which he evidently had acquired after the date of his will, he intended her to take an absolute interest in the sum of £950, charged on the lands devised, as residuary legatee under his will. In my opinion, the more reasonable and proper inference to be drawn from the evidence is, that the testator looked upon the charge as merged in the lands, and that he intended it so to merge.

But there is also another view of the case which was not so much, if at all, discussed in the arguments, viz., apart from the question of merger, did not this charge of £950 pass by the devise in the will to the two bishops? Of course, at the time the will was made it could not pass, as the testator was not then entitled to it. But he became entitled to it on the 8th of June, 1879, and the will was afterwards republished at the date of each of the three codicils. Besides, by sect. 24 of the Wills Act, every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will. Now, reading this will as made at the date of republication, or at the date of his death, what is its effect? The testator is owner in fee of the lands, subject to his wife's

Wylie, J. 1907.

In re BUTLIN'S ESTATE.

life estate; he is also absolute owner of a charge of £950 secured on the lands, and by his will he directs that, after his wife's death, the lands shall be sold, and he bequeaths "the principal sum to be realized by the sale" to the two bishops, upon certain trusts, and makes no mention of the charge. What, under the circumstances, is the meaning of "the principal sum to be realized by the sale"? Does it not mean the sum for which the lands were sold, less the costs and expenses of the sale? Are not the words sufficient to pass the entire net proceeds of sale? Can there be any doubt, taking the will and codicils as a whole, that the testator intended to pass the entire net proceeds? If so, is there any rule of law compelling me to take part of "the principal sum"—a sum of £950—and give it to the residuary legatee? I think not, and, therefore, on this ground also, I think that the vendor's objection fails.

Solicitor for the vendor: *Lewis J. Watters.*

Solicitors for the Commissioners of Charitable Donations: *Maxwell & Weldon.*

J. E. W.

Barton, J. 1906.

June 5, 7, 8, 13. July 25.

Appeal. 1907.

Jan. 17, 18.

HANLY *v.* CARROLL.

(1905. No. 529.)

Will—Construction—Annuity—Use upon a use—Express trust—Statute of Limitations.

A "rent" may be created after a use, so as not to transgress the rule that a use cannot be limited upon a use. The gift of a "rent" by a limitation of a use upon a use does not necessarily create a trust or equitable estate, but may create a new legal estate and give the seisin in the "rent" to the annuitant, and such a "rent" will not be deemed a "use upon a use."

A testatrix, after bequeathing a sum of £1200, charged on certain lands, to three of her daughters, devised the lands to two of them, Anne H. and Alice H., in the following terms:—"To hold the same *unto and to the use* of said Anne H. and Alice H., their heirs and assigns, for ever, to the uses and upon the trusts, and subject to the bequests and charges hereinafter mentioned and expressed—that is to say: *To the use and intent* that my daughter Agnes and her assigns may yearly and every year during her life receive an annuity of £25, to be charged upon and issuing out of the said lands." After providing for the days of payment, the testatrix gave "full powers to said Agnes

and her assigns to distrain for arrears of said annuity." In a subsequent clause a second annuity was given to same annuitant in terms which admittedly amounted to an express trust. Since 1879 no payment had been made on foot of the first annuity, and there was no acknowledgment in writing sufficient to satisfy the Statute of Limitations :—

Held, by the Court of Appeal (affirming the judgment of Barton, J.), that, applying the rule above stated, there was a gift of a legal rentcharge, which should not be deemed a use upon a use; and that, inasmuch as there was no duty or obligation imposed on the trustees of the will in reference thereto, the annuity was not secured by any trust, express or otherwise, and, in the absence of anything which, in the opinion of the Court, would amount to fraud, was barred by the Statute of Limitations.

Quære: Whether, assuming that the annuity was secured by an express trust, it would be a "sum of money charged upon or payable out of any land or rent or a legacy" within the meaning of section 10 of the Real Property Limitation Act, 1874, in which case it would have been barred by the statute; or whether it would be an annuity charged on land, included in the definition of "rent" in sect. 1 of the Real Property Limitation Act, 1833, in which case it would have been saved from the statutory bar by the operation of sect. 25 of that Act, coupled with the provisions of sect. 28 (2) of the Judicature (Ireland) Act, 1877.

ACTION.

The plaintiff was a daughter of Mrs. Agnes Margaret Hanly (deceased), late of 68 Leinster-road, Dublin, and was for many years a member of the Community of Notre Dame Marie Auxiliatrice, residing at 11 Rue Borsent, Lyons, France.

By her will, dated 19th May, 1879, and which was divided into consecutively numbered paragraphs, Agnes Margaret Hanly, after appointing the sum of £1,200, charged upon the lands of Coolbawn and Knockinahany, in the county of Tipperary, over which sum she had a power of appointment under her marriage settlement, to three of her daughters—Anna, Alice, and Mary, in three equal shares, then proceeded to make the following dispositions in paragraphs numbered 3 and 4 in the will :—"(3) I give, devise, and appoint, unto my daughters, Anna Hanly and Alice Hanly, and their heirs all and singular, the lands of Coolbawn and Knockinahany, in the county of Tipperary with their appurtenances, to hold the same *unto and to the use* of the said Anne Hanly and Alice Hanly, their heirs and assigns, for ever, to the uses and upon the trusts, and subject to the bequests

Barton, J. 1906.

HANLY v. CARROLL.

and charges hereinafter mentioned and expressed—that is to say, *to the use and intent* that my daughter Agnes Hanly, now a member of the Community of Notre Dame Marie Auxiliatrice, and her assigns, may yearly and every year during her life receive an annuity of £25 to be charged upon and issuing out of the said lands, and in exoneration of my personalty, and to be payable by two equal half-yearly payments, on the first day of May and first day of November in every year without any deduction; the first half-yearly payment thereof to be made on whichsoever of said gale-days shall first happen six months after my death, and a proportionate part thereof to be payable up to the day of the decease of said Agnes Hanly, with full powers to said Agnes and her assigns to distrain for arrears of said annuity; (4) and in case my said daughter Agnes shall at any time cease to live in the said Community of Notre Dame Auxiliatrice, *upon trust to raise and pay* to said Agnes Hanly and her assigns out of the said lands and premises, and not out of my personalty, an annuity of £25 per annum during her life, in addition to the £25 per annum hereinbefore already charged for her, payable by half-yearly payments on every first day of May and first day of November, respectively, the first payment to be made on the first of these gale days which shall happen after she shall cease to live in said Community, and with like powers of distress and remedy for enforcing payment as aforesaid, and I direct that said first-mentioned annuity of £25, and the said second-mentioned annuity of £25, if and when same shall become payable, shall be first charges upon said lands next after said sum of £1,200 shall be paid, and may be enforced in preference and priority to all other charges under this my will without any deduction."

The testatrix died on 19th October, 1879, whereupon Anne Hanly and Alice Hanly entered into possession of the lands devised by the will and upon the trusts therein contained.

Anne Hanly died in March, 1892, leaving Alice Hanly her surviving, and Alice Hanly continued in receipt of the rents and profits of the lands up to the time of her death, which occurred on the 25th November, 1900. By her will, dated 28th May, 1895, she appointed the defendants, Anne Carroll and John Robert O'Connell, her executors. Since the death of Alice Hanly, Anne

Carroll had been, and was, at the date of these proceedings, in receipt of the rents and profits of the lands.

The first gale of the first annuity given to the plaintiff became due on 1st May, 1880. But the plaintiff never received any payment on foot thereof; never exercised the power of distraint; and never received any acknowledgment in writing during the statutory period.

The questions raised were (1) whether the aforesaid annuity was the subject of an express trust; and (2), assuming that it was, whether this annuity would be a "sum of money charged upon or payable out of any land, or rent, or any legacy" within the meaning of sect. 10 of the Real Property Limitation Act, 1874, in which case it would have been barred by the statute, or whether it would be an annuity charged on land, included in the definition of "rent" in sect. 1 of the Real Property Limitation Act, 1833, in which case it would have been saved from the statutory bar by the operation of sect. 25 of that Act, coupled with the provisions of sect. 28 (2) of the Judicature (Ireland) Act, 1877.

The Court decided that the annuity was not the subject of a trust, express or otherwise, and that it was, therefore, barred by the statute, there being nothing which, in the opinion of the Court, amounted to any fraud on the part of the defendants. The determination of the second question, therefore, became unnecessary.

Jellett, K.C., Conner, K.C., and *Figgis*, for the plaintiff:—

It would be altogether too narrow a construction to hold that the first annuity of £25 merely conferred upon the plaintiff a legal rentcharge operating under the Statute of Uses, and had not the effect of creating any trust for the plaintiff or imposing any duty on the trustees of the will in reference to such annuity. The testatrix gave all the property for the "uses, intents, and purposes," in the will mentioned. The plaintiff's annuity is the first "intent" mentioned, and the trustees are bound to carry out the intention of the will, which was that before any other purposes were served the plaintiff should get her annuity. There is nothing to coerce the Court to limit the words "use and intent" in a will to the creation of a legal rentcharge. In wills it is immaterial whether

Barton, J. 1906.

HANLY v. CARROLL.

the word used is "use" or "trust": *Doe* v. *Collier* (1); *Biscoe* v. *Perkins* (2). It is plain from the entire will that the subsequent gifts are made subject to the plaintiff's annuity, and all through the will the same terms are used in reference to the plaintiff's first annuity and in reference to the second annuity which is undoubtedly secured by an express trust. It is a general and recognized rule that when a testator gives his property to trustees, and creates charges upon it, and goes on to deal with the estate as subject to such charges, the trustees are to be taken as getting the property for the purpose of working out the intention of the testator, and that there is a trust to pay such charges: *Hunt* v. *Bateman* (3); *Commissioners of Charitable Donations and Bequests* v. *Wybrants* (4). The essentials of an express trust are defined by Lord O'Hagan in *Thomson* v. *Eastwood* (5), cited with approval in *Cunningham* v. *Foot* (6); see also Lord Blackburn's judgment in the same case at p. 1003.

D. B. Sullivan, K.C., and *Timothy Sullivan*, for Anne Carroll, one of the defendants:—

The first annuity is not secured by any trust, express or otherwise. The clause in the will providing for the payment of this annuity imposes no duty on the trustees of the will to collect and pay, while the annuitant is herself given power to distrain. The wording of the clause in question is in sharp contrast to the succeeding clause, where appropriate legal language is used to create what is admittedly an express trust, the words being—"upon trust to raise and pay." The clear intention of the testatrix was to create a legal rentcharge in the case of the first annuity followed by a second annuity secured by an express trust, but conditional on the happening of the event mentioned in the will.

Ronan, K.C., and *Pierce Nolan*, for the other defendant, J. R. O'Connell.

(1) 11 East, 377.
(2) 1 Ves. & B. 485.
(3) 10 Ir. Eq. R. 360.
(4) 2 Jon. & Lat. 182.
(5) 2 A. C. 215, at p. 252.
(6) 3 A. C. 974, at p. 998.

[The principal cases cited in reference to the second question which was argued but not decided were *Hughes* v. *Coles* (1); *Dower* v. *Dower* (2).]

BARTON, J.:—

July 25.

The plaintiff is a nun of the Community of Notre Dame Marie Auxiliatrice, residing in a convent at Lyons in France; she seeks to enforce her right to an annuity of £25 given to her by the will of her late mother Mrs. Agnes Margaret Hanly, who died in 1879. The defendant, Anne Carroll, is the person at present entitled to the rents and profits of the lands of Coolbawn and Kockinahany in county Tipperary, on which the annuity was charged by the will. She and her co-defendant are the executors of the surviving trustee of the will, and have acted in the trusts of the will. The testatrix died in 1879; and the first gale of this annuity became due on 1st May, 1880. Plaintiff has never received any payment; has never distrained; and has received no acknowledgment in writing within any statutory period. Accordingly the defendants rely upon laches and the Statutes of Limitations. The plaintiff seeks to escape the effect of those statutes by alleging concealed fraud and an express trust.

[His Lordship found on the facts that there had been no laches on the part of the plaintiff, and no fraud on the part of the defendants, and continued:—]

This brings me to the questions of the Statute of Limitations and of express trust. This is an annuity charged upon land which, by section 1 of the Real Property Limitation Act, 1833, is included in the word "rent." It is not disputed that, if this annuity was no more than a legal "rent," the title to it is altogether barred by section 2 of the Act of 1833, as amended by section 1 of the Act of 1874. If it be no more than an equitable "rent" or "rent" in equity, it is barred by section 24 of the Act of 1833. But the plaintiff says that this annuity is something more than a mere legal rent or rent in equity, and that it is saved from the Statute of Limitations by section 25 of the Act of 1833, which provides that where any land or rent shall

(1) 27 Ch. D. 231 (2) 15 L. R. Ir. 264.

Barton, J. 1906. HANLY v. CARROLL.

be vested in a trustee upon any express trust, the right of the *cestui que trust* shall not be deemed to have accrued until after a conveyance to a purchaser for value; and by section 28 (2) of the Irish Judicature Act, which enacts that no claim of a *cestui que trust* against the trustee for any property held on an express trust . . . shall be held to be barred by any Statute of Limitation. I may observe in passing that this section—differing in that respect from the corresponding English section—goes on to say, "This provision, however, is not to affect the enactments contained in the 10th section of the Real Property Limitation Act, 1874, when the same shall come into effect."

But before we approach the question of the 10th section of the Act of 1874, the question must be answered—Was this annuity a mere legal "rent" or "rent" in equity, or was it vested in a trustee upon an express trust within the meaning of section 25 of the Act of 1833, or property held on an express trust within section 28 (2) of the Judicature Act? This question turns upon the construction of the will, which I propose to carefully examine. In construing the will, it is well to bear in mind that, whether the Statute of Uses applies to a will or not, the Court should, in construing a will, have regard to that statute and to the law relating to uses, because a testator, when he makes a devise to uses, may be presumed to have had that statute and law in view.

The testatrix in the first instance, in exercise of a power of appointment, bequeaths a charge of £1,200 to three of her daughters. She then proceeds to give the lands in question to her daughters Anne and Agnes, as trustees, in the following words: "unto my daughters Anne Hanly and Alice Hanly and their heirs . . . to hold the same unto and to the use of the said Anne and Alice, their heirs and assigns, subject to the bequests and charges hereinafter mentioned and expressed." The grantees and *cestuis que use* being the same, the grant would operate at Common Law rather than by the statute; but, whether it operated at Common Law or by the statute, it would operate to give seisin to the trustees. As a result, it would follow that all uses declared upon this first use, *other than rents issuing out of the lands*, would be equitable estates or trusts. But the one

departure from the well-known rule, that a use cannot be limited upon a use is a "rent," which is a new estate, and will not be deemed a use upon a use: Lord St. Leonard's note to Gilbert on Uses, p. 347, and *Gilbertson* v. *Richards* (1), *per* Martin, B., at p. 297, affirmed on appeal (2). It is not incorrect to give a rent by limitation of a use upon a use, and when it is given in that way, it does not transgress the rule that a use cannot be limited upon a use; and it does not create a trust or equitable estate, but gives the seisin in the rent to the annuitant.

Bearing in mind that a rent may be created by the limitation of a use upon a use, and that the words "to the intent" are appropriate and common words for introducing a legal rentcharge (see, for example, Bythewood and Jarman's Common Forms of Wills, p. 416), let us examine this succeeding clause of the will, which creates the annuity in the words following:—"To the use and intent that my daughter Agnes . . . and her assigns may yearly and every year during her life receive an annuity of £25, to be charged upon and issuing out of the said lands, and in exoneration of my personalty, and to be payable, by two half-yearly payments, on the first day of May and the first day of November in every year without any deduction, the first half-yearly payment thereof to be made on whichever of said gale-days shall first happen six months after my death, and a proportionate part thereof to be payable up to the day of the decease of the said Agnes Hanly, with full powers to said Agnes Hanly and her assigns to distrain for arrears of said annuity." This clause seems to me to have been intended to create a mere legal rentcharge. I have already dealt with the words "to the use and intent," and have shown that they are appropriate words for that purpose. The clause differs little from the common forms of clauses in wills creating annuities by way of rentcharge to be found in Key and Elphinstone and elsewhere. There is no suggestion of a trust or of any fiduciary duty in the clause. Words such as "to be payable" or "first half-yearly payments to be made" are necessary in such a clause for fixing the time when the gales of the annuity become payable, but do not impose any fiduciary obligation upon the trustees.

But a rentcharge may be secured by an express trust. Is that

(1) 4 H. & N. 277. (2) 5 H. & N. 453.

Barton, J. 1906.

HANLY v. CARROLL.

so in this case? The next clause in the will shows that the testatrix knew how to create an annuity, so as to be subject to a trust. She gives a second annuity to plaintiff in case she leaves the community. The gift is as follows:—"And in case my said daughter Agnes shall at any time cease to live in the said community . . . *upon trust to raise and pay* the said Agnes Hanly and her assigns out of the said lands and premises and not out of my personalty an annuity of £25 per annum during her life." These words "upon trust to raise and pay" are strikingly different from the words creating the first annuity "to the use and intent that Agnes Hanly . . . may receive." In my opinion, the first annuity was given as a legal rentcharge, and the second was made the subject of a trust.

Some other words have been relied upon as pointing to the intention to create a trust as to the first annuity. But I do not think they are sufficient for that purpose. The words "in addition to the £25 a year hereinbefore already charged for her" were inserted to make it clear that if the second annuity should become payable, it was to be in addition to, and not in substitution for, the first. Then the second annuity is given "with the powers of distress and remedies for enforcing payment as aforesaid." These words make the second annuity enforceable by distress; but they do not make the first annuity subject to a trust. Then, considerable reliance was placed upon the words "and shall be paid and may be enforced in preference and in priority to all other charges." But do these words amount to anything more than "shall have priority"? Nobody doubts that the testator intended the first annuity to be paid. The question is by whom, and under what obligation?

Lastly, reliance is placed upon the words in which the annuity is referred to as a charge; and it is contended that this is a case like the *Commissioners of Charitable Bequests* v. *Wybrants* (1) and *Hunt* v. *Bateman* (2), and that the trustees should be held to be under an obligation to see to the payment of the charge. In those cases there was a trust to convey, and it was held that the trustees could not carry out the trust to convey without first discharging the charges, which consisted in the former case of certain annuities

(1) 2 Jo. & Lat. 182; 7 Ir. Eq. R. 58. (2) 10 Ir. Eq. R. 360.

to individuals and charities, and in the latter case of a charge for the payment of debts. But in the present case there is no trust to convey, and no impossibility of carrying out the trusts without paying or raising the charge. The will gives the lands to the trustees charged, *inter alia*, with this annuity; but in clause 8, where the testatrix comes to create the main trust of the will, she says—"I direct that the said" trustees, "their heirs and assigns, shall hold said lands upon trust to pay the rents, issues, and profits thereof, subject as aforesaid, to each of my said daughters." Plaintiff's counsel suggest that the annuity could not be paid except through the medium of the trustees, and that nobody else would be in a position to pay it. But these words, "Upon trust to pay the rents and profits, *subject as aforesaid*, to each of my said daughters," seem to me to have the contrary effect. The trustees would apparently discharge their duty under this clause by paying over the rents and profits to the beneficiary "subject as aforesaid," leaving to the beneficiary as regards this rentcharge the obligation of paying the annuity at the peril of having the lands distrained if the annuity should not be paid. The case is different as regards the second annuity, where the trustees are directed to "raise and pay." But I see nothing in the will which casts upon the trustee a fiduciary obligation to raise or pay in respect of the first annuity.

It is a matter for observation that the two trustees were the two first equitable tenants for life, and beneficially entitled to the lands under the will. But that circumstance will not, I think, convert a charge into a trust. For that purpose, there should be something in the will casting upon the trustees a duty as such to see to the raising or paying of the annuity. That duty is cast upon them in respect of the second annuity by clear words which are conspicuous by their absence in the case of the first annuity; and there is no necessity or obligation thrown upon the trustees of seeing to the payment of the charge, as there was in the cases which have been cited, where the trustee was bound to convey the estate, and could not discharge that duty without providing for the charges in question.

If this annuity were held to be subject to an express trust, a further question would arise whether it is a "legacy charged upon land" within the meaning of section 10 of the Real Property

Barton, J. 1906. HANLY v. CARROLL.

Limitation Act, 1874. If so, it would not be saved from the statutory bar. Upon this subject, the case of *Hughes* v. *Coles* (1) was referred to, but it is not directly in point, because it was a case of an annuity granted by deed, which could not be included in the term "legacy." There is the dictum of the Master of the Rolls in *Dower* v. *Dower* (2), and the opinion of Mr. Theobald, expressed in his book on Wills, 8th edition, pp. 452–3, and in his useful article upon annuities in the Encyclopædia of Laws, which support the view that an annuity charged upon land by will is a legacy charged upon land within section 10 of the Act of 1874. On the other hand, it is contended that an annuity charged on land is not dealt with by the Statute of Limitations except under the word "rent," and that the word "legacy" in section 10, if it applies to an annuity at all, is only applicable to each single annual payment, and does not cover the title to the annuity itself or bar the future payments of it. Having regard to the view which I have taken upon the construction of the will, I am not called upon to express an opinion upon these further questions; and it is not necessary for me to decide whether this annuity would or would not be barred if it were the subject of an express trust, because I hold that it was not the subject of any trust.

J. MAC M.

Appeal. 1907. Jan. 17, 18.

The plaintiff appealed (3).

Jellett, K.C., Conner, K.C., and *Figgis*, for the appellant.

D. B. Sullivan, K.C., and *T. Sullivan*, for the respondent.

Jan. 18.

SIR SAMUEL WALKER, C. :—

There are two questions in this case—(1) whether the first annuity of £25 given to Agnes Hanly is a legal rentcharge *simpliciter* which the annuitant can herself enforce by the ordinary remedies incident to such a rentcharge; or (2) whether it is one in

(1) 27 Ch. D. 231. (2) 15 L. R. Ir. 264.

(3) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

respect of which the trustees of the will have a fiduciary position, so that it is raisable and payable under a trust binding on them as trustees—in other words, whether in this particular will it is given in the same manner and with the same incidents as the second annuity of £25, which is contingently to arise and be payable in the event of Agnes Hanly ceasing to live in the convent? It is not disputed that if the annuity is a legal rentcharge of the character I have mentioned, the Statute of Limitations affords a complete defence to the action. But if this first question is decided in favour of the plaintiff, a second question arises—whether, though there is a trust to pay the annuity, the Statute of Limitations still affords a defence by reason of the provisions of the 10th section of the Act of 1874? Barton, J., has decided the first of these questions in favour of the defendant, and has, therefore, not found it necessary to answer the second; and as I am of opinion that he was right upon the first point, I, like him, find it unnecessary to express any opinion on the second.

The first question entirely depends on the construction of the will—of course as a whole. The testatrix had four daughters, one, the plaintiff, in a French convent, and three others, Anne, Alice, and Mary. She makes a provision for the plaintiff while in the convent, and she also makes a provision for her in case she should leave it. The will is divided into numbered paragraphs, containing separate dispositions. The most material ones are 3, 4, 5, and 8. [His Lordship read paragraph 3, *ante*, pp. 167, 168.]

This is a will which contains both uses and trusts and charges, and it starts with the words—"To the use and intent that." This being the case of a rent, it is not material, so far as regards the question under consideration, that the first devise is to the daughters and their heirs, to hold the same unto and to their use, because it is settled that rent may be declared out of the seisin and estate of the devisees, and will not be deemed a use upon a use: *Gilbertson* v. *Richards* (1). Paragraph 3 of the will then, standing alone, and unless controlled by other parts of the will, is a gift of a legal rentcharge which the annuitant can herself enforce against the lands by distress or by suing the terre tenants, and this right vests in her at once.

(1) 4 H. & N. 277.

Appeal. 1907.

HANLY v. CARROLL.

Sir Samuel Walker, C.

But then it is said that paragraph 4, which contains the gift of the second annuity, alters this character of the first annuity, and imposes a fiduciary position on the devisees named in paragraph 3 in respect of the first annuity as well as the second. [His Lordship read paragraph 4, *ante*, p. 168.] Why was such different language used? It is a carefully drawn will, and the testatrix knew how to frame a trust when she desired. If the words are reasonably clear, we are not to look for reasons, but it may well be that it was not thought desirable to have the devisees embarrassed by a trust while the daughter was in a foreign convent —her whereabouts perhaps unknown. She was bound by vows of poverty, and might not desire to look for the annuity as the case stood, whereas if she left it, she would be getting the second provision like any other member of the family through the trustees.

Then comes clause 5.:—

> "And upon further trust, to levy and raise by mortgage or otherwise out of said lands, and every part thereof, the charges or sums of £600 for each of my daughters, Anne Hanly, Alice Hanly, and Mary Hanly, upon their respective marriages, but not sooner or otherwise, and to invest the same respectively in sufficient securities, and pay the interest thereof respectively to each of my said daughters so marrying respectively, for her life for her separate use, and free from the debts and control or engagements of her husband or husbands, without power of anticipation; and from and after her death, then to pay the principal of her said sum of £600 among her children in such shares and proportions as said daughter shall appoint by will or deed; and in default of such appointment, and so far as same shall not extend, then to such children, if more than one, in equal shares."

These words are quite appropriate, as there was a clear trust declared in the preceding paragraph.

The next material clause is No. 8:—

> "Subject to the annuities or annuity as aforesaid, as the case may be, for my daughter Agnes, and to the marriage portions hereinbefore charged on said lands, or such of them as shall become payable, I direct that said Anne Hanly and Alice Hanly, and their heirs and assigns, shall hold said lands upon trust to pay the rents and issues and profits thereof, subject as aforesaid, to each of my said daughters, Anne Hanly, Alice Hanly, and Mary Hanly; and so long as there shall be more than one of said three daughters living and spinsters, in equal shares: with power to the one of my said three daughters, Anne, Alice, and Mary,

who shall survive the death or marriage of the other two, and being herself a spinister, subject as aforesaid, to dispose absolutely of said lands to any one or more of my children or grandchildren only; and in default of such disposition, and so far as such appointment shall not extend (but subject as aforesaid, and also subject to a charge of £100 for my son Con, payable as hereinafter mentioned, and to another charge of £1000 for the children of my daughter Margaret, also payable as hereinafter mentioned), from and after the decease of such unmarried survivor, to the use of my son John P. Hanly for life," with remainder to his sons in tail male, with remainder to the use of her son Con Hanly for life, with remainder to his sons in tail male, and with remainders over.

It cannot be contended that the words "subject to" indicate the existence of a trust. A fiduciary obligation will not follow from such words as "subject to," or "paying," or "on condition": *Hodge* v. *Churchward* (1), adopted as clear law by Lord Cairns in *Cunningham* v. *Foot* (2), is a clear authority for that. *Hunt* v. *Bateman* (3) was strongly relied on for the appellant, where, on the language of the particular will, the Court came to the conclusion that the trustees were express trustees for the payment of debts. That was decided on the context of the whole will: and on its frame it was held that one of the trusts was a duty to pay the debts. There was a direction to convert. *Cunningham* v. *Foot* (2) is a very strong case to show the necessity of finding words of actual trust and fiduciary obligation, as distinct from charge and obligation, if it is sought to make out an express trust, and that case also illustrates the necessity of finding the words of trust clearly coupled with the particular subject. The decision is a very strong one, and there was much to be said for the decree of Sir Edward Sullivan; but the principle I have stated may be collected from the decision. In each case the language of the particular instrument must be the real guide, and, reading this will paragraph by paragraph, and as a whole, I am of opinion that the judgment of Barton, J., was right, and that the appeal must be dismissed.

FITZ GIBBON and HOLMES, L.JJ., concurred.

Solicitors for the plaintiff: *Kennedy, Son, & Figgis.*

Solicitor for the defendant: *A. Carroll.* R. D. M.

(1) 16 Sim. 71. (2) 3 A. C. 974, 990. (3) 10 Ir. Eq. R. 360.

Appeal.
1906.

MOORE, Tenant; M'CLINTOCK, Landlord (1).

Nov. 22, 23. *Landlord and tenant—Land Acts*, 1881, 1887, 1896—*Town park—Accommodation land—Unfiled agreement fixing fair rent.*

In 1884 an agreement and declaration fixing a fair rent of a holding was signed by the landlord and tenant, but was never filed in the Land Commission, although the rent fixed by the agreement was thenceforth accepted by the landlord.

On the hearing of an appeal from an order of the Land Commission fixing a fair rent of the holding:—

Held (*per* FitzGibbon and Holmes, L.JJ.; Sir Samuel Walker, C., *diss.*), that the agreement of 1884 did not operate as an estoppel against the landlord, so as to prevent him contending that the holding was a town-park; and that, although the fact of the agreement having been signed and acted upon was strong evidence against the landlord's contention, it was outweighed by the other evidence given by the landlord in favour of the holding being a town-park, and that the order fixing a fair rent should be discharged.

Appeal by the landlord, Mrs. Amy H. M'Clintock, from an order of the Land Commission fixing a fair rent on the tenant's holding.

The holding mentioned in the originating notice contained 4a. 3r. 30p. statute measure, and was situated about a quarter of a mile from the town of Fintona. John W. Moore, the tenant who served the originating notice, but who died before the re-hearing by the Chief Commission, bought the holding in or about the year 1882, at a public auction, for £70. The previous tenant was Daniel Mimnagh, a whitesmith, living in Fintona, and before Mimnagh's time the holding was in the hands of Neil Gorman, a spademaker, living in Fintona, who grew potatoes on part of the holding, and grazed the rest. John W. Moore lived in Fintona, where he carried on a large drapery business, employing several assistants. Moore kept cows in Fintona, which were driven out to the holding for grazing. He

(1) Before Sir Samuel Walker, C., and FitzGibbon and Holmes, L.JJ.

also grew oats and potatoes, but no more than was required for the use of his establishment in town. He deposed in his evidence before the Sub-Commission that the holding was a great convenience to him in connexion with his business in the town, and that it was for that he bought it.

On the 2nd of June, 1884, Mr. Eccles, the then landlord, and Moore signed an agreement and declaration fixing the fair rent of the holding at £5 6*s.*, the original rent having been £7 14*s.* 9*d.* Mr. Eccles died shortly afterwards, and his successors being minors this agreement was never filed in the Court of the Land Commission, although the consent of the Lord Chancellor was obtained for such filing, but the reduced rent had been paid and received since the date of the agreement.

The report of the Sub-Commission stated that the holding was used for grazing, the soil being loam and clay; and that there were no buildings. They valued 3A. 2R. 10P. at 18*s.* per acre, 1A. 1R. at 12*s.* per acre, and added a proximity value of 15 per cent. The Sub-Commission fixed a fair rent of £4 7*s.* 6*d.*

The landlord having required the case to be re-heard before the Head Commission, the Court valuers reported that the holding was suitably used and in good condition; and they valued 3A. 2R. 10P. at 22*s.* per acre, and 1A. 1R. at 15*s.* per acre, including in the acreable rent the value of proximity to Fintona. The Court assessor inspected the holding, and reported that it bore increased value as accommodation land to the tenant, over and above the ordinary letting of a farm.

At the re-hearing before the Head Commission the following evidence was given by the landlord's agent in the direct examination:—

279. "Have you a number of people, merchants and business people of different kinds, in Fintona holding what you call accommodation fields outside the town?" "Yes."

281. "Take that list that you call town-parks; what is the average rent per acre?" "The average rent per acre of what I call the town-parks of Fintona is 27*s.* 6*d.*"

283. (Mr. Justice FitzGerald) "There have been no fair rents fixed on any of these except this?" "No, my lord."

284. "Take the holdings with proximity value close to

Appeal. 1906. MOORE, *Tenant;* M'CLINTOCK,

Fintona?" "I take them from each townland adjoining Fintona, agricultural holdings on which fair rents had been fixed. I take the average all round, two out of each townland, and it averages 9*s.* 6*d.* per acre up to 1905, including proximity."

288. "From your own experience, as agent, during these last few years, is it your evidence that land is required by people in Fintona?" "Yes."

289. "And they give rents in excess of the ordinary agricultural or proximity values?" "They are willing to pay it and far more, twice as much as they are charged by the Ecclesville estate, by people who have it to let."

The Land Commission fixed the fair rent at £4 14*s.* From that order the landlord appealed.

Henry, K.C., and *Chadwick*, for the appellant:—

This holding is a town-park, and a fair rent should not have been fixed. The agreement of 2nd June, 1884, was never filed, and does not work as an estoppel so as to prevent the landlord raising the point that the holding is a town-park: *Givan* v. *Moffitt* (1). It is at most evidence of value, and there is ample evidence of the holding bearing an increased value as accommodation land over and above its ordinary letting value as a farm. The evidence of the landlord's agent, which was not contradicted, shows that the fair rent fixed by the Land Commission is nearly double the average rent of ordinary agricultural holdings in the neighbourhood, which satisfies the test laid down by Porter, M.R., in *M'Cann* v. *Downshire* (2). This disparity cannot be explained except on the assumption of the holding bearing an increased value as accommodation land.

[They also cited *Christy* v. *Gordon* (3); *Killeen* v. *Lambert* (4); *Archer* v. *Caledon* (5); *MacNamara* v. *MacNamara* (6); *Daly* v. *Wright* (7).]

(1) 14 L. R. Ir. 252.
(2) [1894] 2 I. R. at p. 626.
(3) 13 I. L. T. R. 79.
(4) 10 L. R. Ir. 362.
(5) [1894] 2 I. R. 473.
(6) 32 L. R. Ir. 1.
(7) *Ibid.* 9.

Patchell, K.C., and *Leech*, for the respondent:—

Appeal. 1906.

MOORE, *Tenant;* M'CLINTOCK, *Landlord.*

No doubt the holding was an accommodation to the tenant, but the onus lies on the landlord of proving an increased value as such accommodation land, over and above the ordinary letting value as a farm. The average rent of ordinary agricultural holdings in townlands adjoining Fintona, suggested by the agent as 9*s.* 6*d.* per acre, is arrived at by an unreliable method, namely, by taking two holdings only out of each townland. There is nothing to show that there were not other holdings, including this one, bearing a much higher acreable rent.

In any event, we contend that the agreement of 2nd June, 1884, although not amounting to an estoppel, renders it inequitable that the landlord should be now heard, and contend that this holding is a town-park.

SIR SAMUEL WALKER, C.:—

Nov. 23.

We have heard this case fully, and, as we are not agreed as to the conclusion we should come to, I shall now shortly state my reasons for not agreeing with the conclusion arrived at by my learned brethren. There is no doubt that this holding has a great many, in fact most, of the elements of a town-park, and that Fintona is sufficiently large to have town-parks attached to it; but I am not prepared to overrule the two decisions of the Sub-Commission and of the Chief Commission, who have held that it was not a town-park, and that a fair rent should be fixed. The difficulty in all cases is whether the increased value, which exists beyond all doubt, is proximity value or accommodation value. In this particular case the Sub-Commissioners have said that there is a proximity value of 15 per cent., and adding that, they fixed a fair rent of £4 7*s.* 6*d.* Under these circumstances, the case came before the Chief Commission, who decided in favour of the same view; Mr. Justice FitzGerald, no doubt, had before him the evidence of his assessor, who is, I am certain, a very eminent valuer, selected from amongst the most efficient. He has found that there was an increased value as accommodation value; what the amount was as distinct from *proximity* value, he has not told us: He says His Lordship read from the assessor's report].

Appeal. 1906.

MOORE, *Tenant;* M'CLINTOCK, *Landlord.*

Sir Samuel Walker, C.

Then, on the other hand, taking the history of this holding, there is a great deal to be said, and I feel the force of the argument that this, so far as its history is concerned, is a town-park. It was held first by Neil Gorman, then by Mimnagh, both of whom lived in the town of Fintona, and then, in or about 1878, Moore bought these three fields, comprising about 5 acres, for £70, the rent then being £7 14*s.* 9*d.* Therefore, so far, the history of the case would seem to suggest that of a town-park, and also the user by Moore was more consistent with that of a town-park than anything else; he used the grass for grazing his cows, which were driven out from the town, and the other fields for cropping, the produce being used for his house in town, and the surplus, if any, sold. Therefore, so far as the history is concerned, it does suggest the holding being a town-park; but then the question that troubles me is this—is it certain on the evidence that the landlord has made out his case that the increased value thus appearing is accommodation value as distinct from proximity value? I do not think that this is so satisfactorily made out as to enable us to say that the landlord has discharged the onus of proof laid upon him. But what has determined me in the conclusion I have arrived at is the agreement of the 2nd June, 1884, by which the ancestor of the present landlord agreed with Moore, the tenant, that the fair rent of the holding should be fixed at the sum of £5 6*s.* It was so fixed with the intention of the agreement being filed, but the agreement was *not* filed. It was retained by the agent, and remained in his possession. The possession of the agent was the possession of the landlord. If it had been filed, there is no question but that this point could not be raised now, having regard to recent legislation. I cannot bring myself, having regard to that agreement, to any other conclusion but that it ought to turn the scale in favour of the tenant, as a matter of evidence, and that this holding ought to be treated according to the understanding of the parties in 1884 as having no accommodation value, and as a holding within the Land Law Acts. It was a condition of the fair rent agreement that it should be. Further, the present landlord is one of the co-heiresses-at-law of the landlord in 1884, and I think it would be a fraud on her part to allow her to successfully avail herself of the default of the agent. Under these circum-

stances, and whilst recognising the difficulty of the case, I should have preferred if it had been allowed, to rest on the decision of the two tribunals—the Sub-Commission who inspected the holding and the Chief Commission who delivered the judgment we have before us.

Reliance has been placed here on a comparison of the fair rent of this holding as fixed by the Chief Commission, and the rent of 9*s.* 6*d.* given in evidence by Col. Alexander, the landlord's agent, as the average fair rent of agricultural holdings in the townland surrounding Fintona. This evidence, however, is not to my mind satisfactory; that average rent of 9*s.* 6*d.* was arrived at by Colonel Alexander by taking two holdings from each townland; but how he took them, or how this selection was made, does not appear. No doubt, he was not cross-examined on the point; but I have grave doubts whether, if the system pursued by him had been investigated, it would be found to have led to an accurate result. My two brethren have arrived at a different conclusion, namely, that the holding does bear an increased value as accommodation land, and that corresponds with the report of Mr. Justice Fitz-Gerald's assessor; but, for the reasons I have mentioned, I am unable to agree in their conclusion.

FITZ GIBBON, L.J.:—

I disclaim going against the decision of two tribunals, or of any tribunal which heard the case, upon any question except that of the source of the increased value which this holding has been found to bear above that of similar land in the same district. There was express evidence of the existence, near Fintona, of a class of holdings on which fair rents had been fixed at an average rate of about 9*s.* 6*d.* an acre, these being holdings which were fairly to be compared, in quality of the land, with the one under investigation in the present case, but where there was no proof of increased value for accommodation. My difficulty upon the "Pink Paper" of the Sub-Commission arises, not on the allowance for "proximity value" alone, but on the figure for "proximity value" taken in connexion with the acreable rent put upon the land in the first instance. In the presence of evidence that on other holdings near Fintona an average fair rent of 9*s.* 6*d.* has

Appeal. 1906. MOORE, *Tenant;* M'CLINTOCK, *Landlord.* Fitz Gibbon, L.J.

been fixed, the Sub-Commission put a rent on the principal portion of this holding of 18*s.* an acre, nearly double the average, 15*s.* on the rest of the agricultural land, and they then added 15 per cent.—3*s.* in the £1—to that, attributing this *further* increase to "proximity value."

It is not to be forgotten that "proximity value" and "accommodation value" are different in kind, and arise from different causes. "Proximity value" means that the land is worth more to the occupier, because it is near something which enables him to make more money out of it as a productive agent. "Accommodation value" arises where a higher price can be got for the land, and it is worth more, because a particular class of people—namely, the people living in the adjoining town—want it for accommodation purposes, and it is worth more to them, and they will pay more for it, for those purposes, than it would be worth, or would bring, for use as a merely agricultural or pastoral agent of production. In the *Caledon Case* (1) we were asked to believe that 50 per cent.—half the value—was attributable to the increased productiveness due to proximity to Caledon; that we refused to do, and we drew the conclusion that this increase was really attributable to the demand of the townspeople for accommodation land. I draw the same conclusion here from the increase of the acreable rent from 9*s.* 6*d.* to 18*s.* and 15*s.*, and the 15 per cent. further increase, both of which are admitted by the Sub-Commission.

Here we have, in addition, the statement of Colonel Alexander (which is uncontradicted, and not even made the subject of any qualifying or contradictory evidence on the other side) that this land does bear a considerably increased value as accommodation land. Although this question does not appear to have been developed in evidence on either side before the Sub-Commission, an appeal was taken, and the real question—that of the increased value—was raised and referred to a selected tribunal—namely, the skilled assessor, and when we are told that we are going against the decision of two tribunals, I reply that we are setting up the judgment of the one tribunal which was specially charged and

(1) [1894] 2 I. R. 473.

qualified to ascertain the fact which, when established, decides the case in point of law. The assessor visited the place, and investigated the circumstances of the holding, and arrived within 9*s.* at the same value as that of the Sub-Commission—and his finding, which stands before us as a verdict of a jury, is in these words—[His Lordship read the assessor's report]. The judgment of FitzGerald, J., gives no reason for disregarding that finding, and I do not see that we are at liberty to ignore the finding of an expert tribunal specially charged with the determination of the vital question of fact. If this finding is right, it concludes the case, but for the question of the written agreement of 1884, by which the landlord and tenant agreed to fix a judicial rent on this holding. There is reason to suppose that there was something peculiar in the circumstances of that agreement, and we can not say on which side. Was this the only consent? There were other tenants in the same position; did this tenant, for some accidental reason, get an agreement which others who were in the same position did not get? Why has nothing been done on this agreement since 1884?

It is proved, and admitted on both sides, that there are on this estate a number of tenants paying acreably more than an ordinary agricultural rent for their holdings. Why do they pay it? We have from the tenant's counsel only the candid confession — "We do not know why." It is a curious compromise between rights and facts that, after all the investigation, the old rent of £5 6*s.* 1*d.* was only reduced to £4 7*s.* 6*d.*, by the Sub-Commission, and to £4 14*s.* by the Chief Commission, leaving it still far above the agricultural rate of 9*s.* 6*d.* per acre. The presumption from all the facts is, that this holding bears an increased value for which no explanation is given except that it arises from the demand by townspeople for accommodation land. We have a town of 1100 inhabitants, of over 300 houses; every householder would naturally like a bit of land. This land is on the roadside, close to the town; there is not a house on it; it has always been used for accommodation purposes; townspeople only have been tenants of it; almost all the neighbouring ground on the map is occupied by tenants who are paying high rents; and only one similar holding has been identified on which a judicial

Appeal. 1906.

MOORE, *Tenant;* M'CLINTOCK, *Landlord.*

Fitz Gibbon, L.J.

rent has been fixed. With a large experience of such cases, I think the evidence of increased value stronger here than in any case in which we failed to find that it was attributable to accommodation, and that not being in any way displaced by the evidence on behalf of the tenant, I think that the decision of the Chief Commission should be reversed.

HOLMES, L.J.:—

When the tenant's application to have a fair rent fixed came before the Sub-Commission, two witnesses, and two alone, were examined, both of them on behalf of the tenant—one being the tenant himself, and the other a man who worked for him.

The evidence given by the tenant established that the various elements that go to constitute a holding a town-park existed in this case, with the exception of one. There was no evidence one way or other as to whether or not the land bore a higher value by reason of its being accommodation land for the residents of the town. As I have said, these were the only two witnesses examined; they were encountered by no evidence on the question of increased value, the onus of proving which lay on the landlord, and, therefore, no objection can be taken to the Sub-Commission coming to the conclusion they arrived at, and to their fixing a fair rent. In fact, no evidence having been given by the landlord on whom the onus of proof rested on this question of vital importance, no other alternative was open to them. The case then came by way of re-hearing before Mr. Justice FitzGerald, and certain evidence was given which was not before the Sub-Commission upon the point to which I have referred. It was proved that there were several small holdings immediately round the town of Fintona, the tenants of which lived in Fintona, and that, with one exception, no fair rents had been fixed in the case of any of them. It was further proved that the rent of these holdings, as compared with other lands in the neighbourhood which were purely agricultural, was a great deal higher.

This leads to an inference which a Judge might or might not draw, that these holdings, including the particular holding the subject of this appeal, did bear a higher value by reason of their being accommodation lands.

The learned Judge, not being satisfied, directed his assessor to visit the lands, and the report made by him after his inspection was to the effect that they did bear a higher rent not merely by reason of proximity to the town, but also by reason of their being an accommodation to its inhabitants, which latter circumstance is a necessary element in the constitution of a town-park.

Under these circumstances Mr. Justice FitzGerald would probably have had no difficulty in coming to a different conclusion from that of the Sub-Commission, but for one fact of great importance to which the Lord Chancellor has referred. It appears that in 1884 an agreement had been entered into between the landlord and tenant for the purpose of fixing a fair rent, and that this agreement would have been filed with the Land Commission so as to make it a fair-rent holding, were it not that the agent overlooked the matter. If this had been done, the subsequent legislation would now have bound the landlord to admit the tenant's right to have a fair rent fixed. But the agreement was not filed, and there is no estoppel on the landlord. The only way we can regard this agreement is as fairly strong evidence for the tenant, which requires to be encountered by other strong evidence if we are to disregard it; we cannot tell why this agreement was entered into. It appears that the tenants of other lands similarly situated did not enter into such agreements. It would seem to me that there must have been some peculiar relations existing between the parties which led the landlord to say that he would give this tenant an advantage not given to others. What was done was not sufficient to make the agreement an estoppel, and the evidence given before Mr. Justice FitzGerald is enough to show that the tenant had no right, apart from the agreement, to have a fair rent fixed. The conclusion I draw from the entire evidence is that the appeal should be allowed, and the tenant's application dismissed.

Solicitors for the appellant: *Dickie & Carson.*
Solicitor for the respondent: *W. E. Orr.*

R. ST. J. C.

Ross, J.
1907.
Feb. 5.

IN THE MATTER OF THE ESTATE OF EDWARD WALKINGTON THOMSON, OWNER; CHARLES O'CONNELL, ADMINISTRATOR OF CATHERINE RICHARDSON, DECEASED, PETITIONER.

Landlord and tenant—Land Purchase Acts—Redemption of liability for rent out of estate indemnified therefrom—Right over against indemnifying lands—Land Law (Ireland) Act, 1896 (59 & 60 *Vict. c.* 47), *s.* 33 (4).

Where a rent is payable in respect of lands sold under the Land Purchase Acts, but the lands have a right of indemnity against other lands, section 33 (4) of the Land Law (Ireland) Act, 1896, creates, in favour of the person who has paid the redemption-price, a rent on the indemnifying lands equal in amount to the portion of the rent which has been redeemed:—

Held, that such newly created rent does not rank in equal priority to the unredeemed portion of the head-rent, but is inferior to it.

APPLICATION for an order, under section 33 (4) of the Land Law (Ireland) Act, 1896, declaring the petitioner entitled to receive out of certain indemnifying lands the annual sum of £16 7*s.* 5*d.*, being the amount of an apportioned part of a fee-farm rent of £404 5*s.* 2*d.*, reserved by an indenture of fee-farm grant, dated 15th April, 1852, and payable out of the lands of Killeen sold in this matter, without prejudice to, and in equal priority with, the residue of the said fee-farm rent of £404 5*s.* 2*d.*

The facts appear sufficiently from the judgment.

D. F. Browne, K.C., for the applicant:—

Section 33 (4) of the Land Law (Ireland) Act, 1896 (1), is

(1) Section 33 (4) of the Land Law (Ireland) Act, 1896, is as follows:—"Where any liability for any annuity, rentcharge, or rent is apportioned and redeemed out of the purchase-money, and a right of indemnity in respect of such liability exists, the person entitled to the purchase-money shall be entitled to the proportion of the annuity, rentcharge, or rent so redeemed, in like manner as if he had purchased the same; and the Court, after due notice to all persons interested, shall make provision as to the future payment of such

explained by Walker, L.J., in *In re Owens' Estate* (1): "By it, where an annuity is payable in respect of the lands sold, but the lands have a right of indemnity against other lands, the purchase-money once and for all discharges the annuity by a redemption sum, and the person whose purchase-money has paid it is put in the place of the annuitant (by a supposed purchase), in order to enable him to assert the right of indemnity": *In re Kennedy's Estate* (2).

H. Wilson, K.C., and *Macrory*, for the Viscountess de Vesci and others, owners of the fee-farm rent of £404 5*s.* 2*d.*, resisted the application.

Oulton, K.C., for the owners of other lands subject to the said fee-farm rent, and, equally with the applicants, indemnified therefrom.

Ross, J.:—

By an Incumbered Estates Court conveyance, dated 9th May, 1855, certain townlands of Clontygora North and Clontygora South and Edentubber were conveyed, subject, in conjunction with other lands, to an entire fee-farm rent of £404 5*s.* 2*d.*, reserved by an indenture of fee-farm grant, dated 15th April, 1852 (made in lieu of a lease for lives renewable for ever), with such rights of indemnity in respect of an annual sum of £15 13*s.* 10*d.* part thereof, against part of the lands comprised in the grant known as Hall's part of Monascreebe as were given by an indenture, dated 29th July, 1818, but liable to bear the residue of the said rent in indemnification of all the other lands liable thereto. The lands of Killeen, which have been sold in this matter, are portion of the other lands liable to the said rent, and they were, by another Incumbered Estates Court conveyance, also dated 9th May, 1855, conveyed, subject to the said rent of £404 5*s.* 2*d.*, with the like right of indemnity in respect of the said annual sum of

portion of the annuity, rentcharge, or rent so purchased, and as to the land to be liable thereto, and such other provisions as appear to the Court necessary for carrying into effect this enactment."

(1) [1900] 1 I. R. 151, at p. 169. (2) [1902] 1 I. R. 364.

Ross, J. 1907. *In re* THOMSON'S ESTATE.

£15 13*s.* 10*d.*, and also indemnified against the residue of the said rent by the said lands of Clontygora North and Clontygora South and Edentubber. By an order, dated 7th March, 1906, £16 7*s.* 5*d.*, part of the said rent of £404 5*s.* 2*d.*, was apportioned on the said lands of Killeen, and the residue of the rent on the residue of the lands comprised in the fee-farm grant, and, by an order dated 14th June, 1906, the said sum of £16 7*s.* 5*d.* was ordered to be redeemed out of the purchase-money of Killeen. Under these circumstances, the vendor in this matter claims to be entitled to throw the £16 7*s.* 5*d.* on to the indemnifying lands. The remedy is under section 33 (4) of the Land Act of 1896. The person whose money has paid for the redemption is entitled to be given the proportion of the annuity or rent so redeemed, in like manner as if he had purchased the same, that is to say, as if he had purchased the portion of the rent so redeemed. At this point the mind of the Legislature appears to have got into a state of confusion. The proportion of the rent is gone; it has been redeemed and has disappeared; the lands upon which it was apportioned are gone and vested in the tenants, free and discharged therefrom. It is therefore impossible to put the vendor in this matter in the position of a purchaser of the rent apportioned thereon; but the section goes on to direct that the Court "shall make provision as to the future payment of such portion of the annuity, rentcharge, or rent so purchased, and as to the land to be liable thereto, and such other provisions as appear to the Court necessary for carrying into effect this enactment." The Court cannot do impossibilities; but it can do, under this latter part of the section, what the section is intended to effect, viz. to give the person who has paid the redemption-price an annuity on the indemnifying lands equal in amount to the portion of the rent which has been redeemed. That brings me to the question, now raised for the first time, namely, in what priority is such annuity to be paid? Suppose lands of equal value, A and B, are subject to an entire rent of £100, but the lands of A are indemnified against payment thereof by B, if the lands of A are sold under the Land Acts, and the rent of £100 is apportioned equally on A and B, the landlord has a right in future to have B, and the whole of B, as a security for his rent of £50. But if Mr. Browne

is right in his contention, he will find an annuity of £50 competing with him in equal priority. It is absurd to say that the landlord is to be injured, in the security for the portion of his rent unredeemed. The party who paid is to receive an annuity equivalent to the portion of the rent redeemed. Where is this annuity to come in? Certainly not in the same priority as the remainder of the landlord's unredeemed rent. I must, therefore, declare that the new annuity, created in respect of Monascreebe, Clontygora North, Clontygora South, and Edentubber, is to be inferior to the unredeemed portion of the head-rent; and, to protect Mr. Oulton's clients, who have like rights of indemnity against payment of the rent out of their lands, I shall add that such annuity shall be without prejudice to the rights of all persons and lands liable to the unredeemed portion of the said rent, to be indemnified by the said lands of Monascreebe, Clontygora North, Clontygora South, and Edentubber, in equal priority with the applicants.

Solicitors for the applicants: *T. F. O'Connell & Son.*

Solicitors for the owners of the head-rent: *S. S. & E. Reeves & Sons.*

Solicitor for the owners of other lands subject to the head-rent: *Charles MacMahon.*

D. M. S.

Ross, J.
1907.
Feb. 6, 13.

In the MATTER of the ESTATE of MARTHA ELIZA ANNE TYRRELL, MARY ARABELLA WEBB, and ANNA MARIA JOLY, Owners; ANNA MARIA JOLY, Petitioner.

Land Purchase Acts—Superior interest—Redemption price—Annuity charged on land—Option to purchase annuity at a time unlimited—Rule against perpetuities.

Lands were, in 1887, conveyed by a grantor to a trustee in fee, in trust, *inter alia*, to pay and apply £90 per annum out of the rents of the said lands for the support of the Protestant religion, provided, however, that the persons for the time being beneficially interested in the lands as the representatives of the grantor should, if they should think fit, in lieu of the said £90, pay the interest payable on eighteen Russian Imperial bonds for £100 each to and for the aforesaid purpose. The lands having, under the Land Purchase Acts, been sold to the tenants:—

Held, that the proviso for option did not transgress the rule against perpetuities, and that the annuity could be redeemed by assigning eight Russian Imperial bonds in lieu of the annuity.

By a voluntary deed, dated December 4, 1887, and made between Jasper Robert Joly of the one part, and Henry Charles Joly of the other part, Jasper Robert Joly, owner in fee of certain lands, granted to Henry Charles Joly, his heirs and assigns, the lands therein mentioned, portion of which were sold in the present matter, upon trust, *inter alia*, "to pay and apply £90 per annum out of the rents of the said lands for the support of the Protestant religion, in accordance with the Thirty-nine Articles of the Church of England, within the parish of Castlejordan in the Diocese of Meath, such payment to commence from the 1st of May next, provided, however, that the person or persons for the time being beneficially interested in the said estates as the representative or representatives of the said Jasper Robert Joly shall, if he or they shall so think fit, in lieu of the said £90, pay the interest payable on eighteen Russian Imperial or Railway bonds for £100 each to and for the aforesaid purpose."

Portion of the lands comprised in the said deed were sold, and part of the sum realized by the sale was now standing to the credit of the matter.

The petitioner having carriage of the sale in the matter now applied for an order that the annuity of £90 charged on portion of the estate, being No. 23 on the final schedule of incumbrances in the matter, should be discharged by purchase out of the funds to the credit of the matter, and transfer to the Representative Church Body of eighteen Russian Imperial or Railway bonds of £100 each. The application was opposed by the Representative Church Body.

Frank Fitz Gibbon, for the petitioner having carriage :—

The annuity of £90 must be compulsorily redeemed. The petitioner is entitled to have it redeemed in the manner provided by the settlement creating the annuity.

G. W. Walker, K.C., and *Cecil Darley*, for the Representative Church Body :—

This is a very clear case of an absolute gift of an interest in land, followed by a proviso giving a stranger an option to take an interest in the land in exchange for something which may, or may not, be valuable. That right of option to take over our interest in land is an equitable interest therein. The stranger is not bound to exercise that option within any defined time. He has limited to him an equitable interest, which will not necessarily arise within the period prescribed by the rule against perpetuities. The proviso is therefore void, and the first absolute gift of £90 charged on the lands is good, and must be redeemed in the ordinary way : *London & South-Western Railway Company* v. *Gomm* (1); *Worthing Corporation* v. *Heather* (2) ; *In re Bowen* (3) ; *Woodall* v. *Clifton* (4) ; *Christ's Hospital* v. *Grainger* (5) ; *Redington* v. *Browne* (6).

(1) 20 Ch. D. 562.
(2) [1906] 2 Ch. 532.
(3) [1893] 2 Ch. 491.
(4) [1905] 2 Ch. 257.
(5) 1 M'N. & G. 460.
(6) 32 L. R. Ir. 347.

Ross, J.
1907.

In re TYRRELL'S ESTATE.

Feb. 13.

Ross, J. :—

This is an application on behalf of the petitioner for an order that the annuity of £90 charged on portion of this estate may be discharged by the purchase and transfer to the Church Representative Body of eighteen Russian Imperial Bonds.

On the 4th December, 1887, Jasper Robert Joly conveyed portion of the lands for sale in this matter to a trustee in trust, *inter alia*, to pay an annuity for the support of the Protestant religion, in accordance with the Thirty-nine Articles of the Church of England, within the parish of Castlejordan, provided, however, that the person or persons, for the time being beneficially interested in the estate as representative of the said Jasper Robert Joly, should, if they thought fit, in lieu of the said £90, pay the interest on eighteen Russian Imperial or Railway Bonds for £100 each for the aforesaid purpose.

The owners of the estate now propose to take advantage of this option, and to assign eighteen Russian Imperial Bonds to the Church Representative Body in lieu of the annuity. The deed is a voluntary deed. The only question is, whether the owners are at liberty to exercise the option, it being contended that the clause conferring the option is void for attempting to create a perpetuity. The law against perpetuities does not affect this annuity itself, as it is given for a charitable purpose. If the contention of the Church Representative Body is sound, the settlor's representatives, immediately after the execution of the deed, could not have exercised the option. This is a very harsh contention, and not likely to encourage benefactors.

The law on the subject of the rule against perpetuities is by no means in a satisfactory condition.

It is based on grounds of public policy. It prevents owners from disposing of their lands for a period that may exceed a life or lives in being, and twenty-one years afterwards. If a proviso infringes this rule, it is illegal and not enforceable. At the same time such a proviso has been held good as a contract, and damages have been awarded in respect of the breach of it. That is to say, the limitation may be bad, though the contract may be good: *Worthing Corporation* v. *Heather* (1).

(1) [1906] 2 Ch. 532.

Again, the rule is plainly applicable to contracts which give an interest in land, but contracts for the renewal of leases are an exception to the rule. Why they are an exception nobody can tell.

One thing seems to be agreed upon. Where the contract does not create any estate or interest in property, it is not obnoxious to the rule. That is to say, a mere personal covenant, or a covenant that does not, so to speak, run with the land, though unlimited, is not void for perpetuity. An agreement to sell land, or to reconvey land, would appear to create an equitable interest in the land, and would thereupon be affected by the perpetuity rule.

It is very hard to understand how the perpetuity rule can be applied at all to an agreement giving an option of purchase. No interest in the land is acquired until the option is exercised.

In the case before me I cannot see how the representatives of Jasper Robert Joly acquired by virtue of this proviso for option any interest in the hereditament or the lands.

It is a personal or collateral covenant, unlimited, but not creating any interest in any lands. A purchaser, without notice, of the perpetual annuity would not, I think, be bound by this proviso, and the option could not be enforced against him. I am, therefore, of opinion that the proviso is not affected by the perpetuity rule at all, and I will, accordingly, allow eight Russian Imperial Bonds to be assigned in lieu of the annuity.

Solicitors for the petitioner: *T. T. Mecredy & Son.*
Solicitors for the Representative Church Body: *Maunsell, Darley, & Orpen.*

D. M. S.

NOTE.—See *Switzer* v. *Rochford* ([1906] 1 I. R. 399) and *The Attorney-General* v. *Cummins* ([1906] 1 I. R. 406).—[REP.]

Ross, J.
1907.
Feb. 19.

In the MATTER of the ESTATE of the ASSIGNEES of SIR WALTER NUGENT, a Bankrupt, Owners and Petitioners.

Land Judge's Court—Receiver—Registration of recognizances—Surety—Loss of securities—Liability of estate.

Where two of three sureties, who had paid the amount due to the estate, the subject-matter of the petition for sale, by a defaulting receiver, were prevented from enforcing their claim for contribution against their co-surety by the neglect of the responsible person to re-register the recognizances entered into by the receiver and his sureties, whereby the benefit of the securities for the debt was lost:—

Held (without deciding any question as to the person ultimately liable), that the estate should make good the loss.

Application by Francis J. O'Reilly and James A. Denning, sureties on the recognizance of the receiver, for an order that there should be paid to them out of the funds in Court, to the credit of the matter, the sum of £282 6*s.* 8*d.*, or, in the alternative, that it be referred to the examiner to inquire and ascertain what was the amount of the loss sustained by the applicants by reason of the recognizance not having been duly re-registered against Thomas Quin, a co-surety in the said recognizance, within five years after 14th March, 1896, on the ground that by the failure to re-register the recognizance against Thomas Quin, his co-sureties were released, to the amount which they might have recovered out of Thomas Quin's estate, had the recognizance been duly re-registered.

The facts sufficiently appear from the judgment.

H. Wilson, K.C. (with him *Denning*), for the applicants:—

The recognizance of the receiver and his sureties remained unregistered from 14th March, 1901, to 9th September, 1902. During the interval the Bank of Ireland obtained their charge. The Court is the creditor, the receiver is the principal debtor, the

applicants were the sureties. If we had been sued for £800 on our recognizances, and could show that the creditor had failed to supply us with securities for £300, which he ought to have had, we would, *pro tanto*, be released. A receiver appointed by the Court is appointed on behalf of all parties: *Davis* v. *The Duke of Marlborough* (1); *Bainbrigge* v. *Blair* (2). As to the position of the Crown in recognizances, the recognizances are acknowledged in the name of the Crown, as the Crown is a royal trustee for the parties who have submitted their rights to the Royal Courts of Justice: *The Queen* v. *Bayley* (3). The surety has a right, at any moment, to every security held by the creditor at the date of the contract: *Newton* v. *Chorlton* (4); Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), sect. 5; *Forbes* v. *Jackson* (5); *In re Swan's Estate* (6). If, by the neglect of the creditor, the benefit of some of the securities for the debt is lost, the surety, *pro tanto*, is discharged: *Pledge* v. *Buss* (7); *Capel* v. *Butler* (8).

Charles A. O'Connor, K.C., for the petitioners having carriage:—

The duty to re-register is the duty of the receiver, and not of the solicitors having carriage: Madden's Land Judge's Practice, p. 499.

Pierce Nolan, for the National Bank:—

The Bank are the parties really interested in opposing the present application, as they will not be paid in full. The applicants are the sureties for the receiver. The receiver was at fault: it is, therefore, his sureties, and not the estate, who should make good the loss. There is no obligation on the Crown to register or re-register a recognizance: *The Queen* v. *Fay* (9).

Denning, in reply, was not called upon.

(1) 2 Swanst. 108.
(2) 3 Beav. 421.
(3) 4 Ir. Eq. R. 142.
(4) 10 Hare, 646.
(5) 19 Ch. D. 615.
(6) Ir. R. 4 Eq. 209.
(7) Johns. 663.
(8) 2 Sim. & St. 457.
(9) 4 L. R. Ir. 606.

Ross, J.
1907.

In re NUGENT'S ASSIGNEES' ESTATE.

Ross, J.:—

The receiver, Mr. Quin, was appointed with the consent of all the parties, and recognizances were entered into by him and his sureties, by which they were bound in various sums to ensure the faithful performance of his duties. The receiver got into difficulties and resigned, and on 28th April, 1905, an order was made accepting his resignation, and directing him to vouch and pass his final account, and that, upon disposal of the balance found due by him on foot of his account, as directed by the certificate of the examiner, the recognizances should be vacated and a vacate entered on the enrolment thereof. The receiver examiner found a balance of £1200 due by the receiver, and directed him to pay same to the new receiver. He never paid, but the sureties became liable. On 10th June an order was made on the present applicants to lodge £600 on foot of the amount due by the receiver, and this sum was duly lodged by them. On 17th July, 1905, they applied, and were granted the leave of the Court, to put the recognizances in suit against the lands of their co-surety, Thomas Quin.

The applicants, on 31st January, 1906, caused a writ of *scire facias* to be issued on foot of the recognizances, and were about to take the further necessary steps to realize the contributory share payable out of the lands and assets of their co-surety, Thomas Quin, when it was ascertained that Thomas Quin had, on 16th May, 1902, being more than five years after the last previous re-registration of the recognizances, which took place on 14th March, 1896, deposited with the Bank of Ireland the title-deeds of all the lands of which he was possessed, for the purpose of securing a debt due by him to the Bank who had no notice of the recognizances.

By reason of the failure to re-register the recognizances within five years after 14th March, 1896, the equitable mortgage of the Bank has obtained priority over the liability created by the recognizances, and there is nothing now available for the applicants.

Now, it is well established that, where two of three sureties pay off the principal's debt, the creditor is bound to use the

utmost care to preserve their rights against the surety who paid nothing. The receiver is appointed for the benefit of every incumbrancer and other person having an interest in the subject-matter of the suit. The estate is the creditor; the receiver is the debtor. When the receiver makes default, it is the duty of the estate to preserve all securities intact for the benefit of the sureties who have had to make good the loss. Owing to the mistake of some one in failing to re-register the recognizances, the sureties have been injured, and the securities on which they had a right to rely have been damaged. Therefore, without saying who is to blame, I declare the sureties entitled to contribution from the estate; and I direct an inquiry as to the amount.

The sureties need not go further than the estate. At some other stage it is possible that a question may arise among the parties interested in the estate as to the liability of the person by whose default the loss to the estate has occurred.

Solicitors for the applicants: *Hoey & Denning.*

Solicitors for petitioners having carriage: *Maxwell, Weldon, & Co.*

Solicitor for the National Bank: *W. H. Dunne.*

D. M. S.

M. R.
1907.
Jan. 21.

In re MATTHEW DUNNE, Deceased.

LYNCH *v.* DUNNE.

(1906. No. 1265.)

HUME *v.* DUNNE.

(1906. No. 1268.)

Practice—Administration—Transfer and consolidation—Carriage of proceedings—R. S. C., 1905, *Ord. V., R.* 2; *Ord. XLIX., Rr.* 3, 9.

As a general rule, when two summonses for administration of the same estate are brought in different branches of the Chancery Division, the plaintiff who issued his summons first is entitled to the carriage of the proceedings for administration, and to have the other summons stayed, or transferred and consolidated.

Summons.

On December 14th, 1906, an originating summons was taken out on behalf of Michael Lynch and Patrick Lynch, plaintiffs, against Mary Dunne, defendant, to administer the personal estate of Matthew Dunne, deceased, and assigned to the Master of the Rolls, pursuant to Order V., Rule 2. Later on the same day an originating summons for the same purpose was taken out on behalf of Nannie Hume and Sarah Phelan, plaintiffs, against the said Mary Dunne, defendant, and assigned to Mr. Justice Barton, pursuant to the said Order. Both summonses were duly served, but the summons in *Lynch* v. *Dunne* was served first in point of time. Mary Dunne was the widow and administratrix of Matthew Dunne; Michael Lynch and Patrick Lynch were children of Bridget Lynch, deceased, a sister of Matthew Dunne; Nannie Hume and Sarah Phelan were sisters of Matthew Dunne. The other next-of-kin of Matthew Dunne were Patrick Dunne, a brother, and the children of Mary Poole, deceased, a sister. Both summonses appeared in the respective chamber lists of the Master of the Rolls and of Barton, J., on the same day, January 21st. When the summons in *Hume* v. *Dunne* came on for hearing,

Barton, J., on being informed of the summons in *Lynch* v. *Dunne*, and that it was first in point of time, directed the summons before him to be transferred to the Master of the Rolls. Later on the same day the summons in *Lynch* v. *Dunne* came on for hearing before the Master of the Rolls. The defendant had made an offer of £70 to each of the next-of-kin as their share of the assets, but this offer had been refused.

W. G. Gibson, for the plaintiffs in *Lynch* v. *Dunne* :—

The plaintiffs' summons was first in point of time, both as to issue and service, and they are therefore entitled to have an order made on their summons, and to get the carriage of the proceedings.

Cooper, for the plaintiffs in *Hume* v. *Dunne* :—

These plaintiffs represent more of the assets than the plaintiffs in the other summons, and should therefore have priority.

D. J. O'Brien, for the defendant, did not oppose an order for administration being made.

THE MASTER OF THE ROLLS :—

The assets in this case are small, and the question of the carriage of proceedings is, perhaps, of little importance; but the same point may arise in other cases, and it is as well that it should be known that Mr. Justice Barton and myself mean to adhere steadfastly to the rule, that in cases like the present the plaintiff who is first in the field is entitled to the carriage of proceedings, unless there be some real ground of objection to him rendering him unfit or unsuitable to be entrusted with the carriage. There is not a particle of difference between the parties here in respect of fitness or suitability. Mr. Gibson's clients were first in the field; their summons was issued first, and served first. But whether the summons was served first or not, it takes its priority according to the date of issue, and in this essential respect Mr. Gibson's clients were first in point of time. Mr. Cooper says that his clients represent a majority of interests, but that cannot displace the priority of Mr. Gibson's clients. There is no suggestion that

M. R. 1907. *In re* DUNNE.

Michael and Patrick Lynch are unfit or unsuitable persons to be entrusted with the carriage of proceedings. There is nothing to be said against them or against Mr. Cooper's clients. In my opinion, one person or set of persons representing the next-of-kin of an intestate in an administration suit is as good as a dozen, provided the one person or set of persons happens to be honest and diligent. The summons in *Hume* v. *Dunne* having been transferred to this Court, I order that it shall be consolidated with the summons already pending in this Court—in *Lynch* v. *Dunne*—and I make an order for administration in the consolidated suit, and give the carriage of the proceedings to the plaintiffs in *Lynch* v. *Dunne*. The plaintiffs in *Hume* v. *Dunne* will be entitled to their costs out of the assets, and may attend the proceedings in Chambers at their own risk (1).

Solicitor for the plaintiffs Lynch: *R. J. Fetherstonhaugh.*
Solicitor for the plaintiffs Hume and Phelan: *M. Green Foley.*
Solicitor for the defendant: *Patrick J. Meehan.*

W. L.

Wylie, J. 1907.

IN THE MATTER OF THE ESTATE OF MARIANNE DOYLE AND ANOTHER.

Jan. 28. Feb. 7.

Land Purchase Acts—Irish Land Act, 1903—Agreement for sale in the prescribed form—Absence of time limit—Rule against perpetuities—Conversion.

The fact that, in an agreement for sale under the Irish Land Act, 1903, in the prescribed form, there is no limit of time fixed within which the conditions on which the carrying out of the agreement depends are to be performed, does not render the agreement void as violating the rule against perpetuities.

Where an agreement for the sale of an estate to the occupying tenants direct, under the Irish Land Act, 1903, had been entered into by two co-owners entitled as tenants in common, one of whom died before the agreement, which was subsequently carried out, had been sanctioned by the Estates Commissioners:—

(1) See Wylie's Judicature Acts, Ord. XLIX., Rr. 3, 9, pp. 685–687, and cases there cited.—[REP.]

Held, that the moiety of the deceased co-owner had been converted into personalty at the date of her death.

QUESTION submitted by the Examiner for the opinion of the Judicial Commissioner.

Marianne Doyle and Elizabeth Campion, being entitled as tenants in common in fee to the lands comprised in the estate, situated in the county of Carlow, entered into an agreement in the prescribed form for the sale thereof to the occupying tenants under the Irish Land Act, 1903. Prior to the sanctioning of the said agreement by the Estates Commissioners, Elizabeth Campion died intestate, and without issue, leaving her husband, Thomas Henry Campion, and Marianne Doyle, her heiress-at-law, her surviving. Letters of administration to his deceased wife were duly granted to Thomas Henry Campion. On the settling of the allocation schedule, Marianne Doyle claimed to be entitled to one moiety of the residue of the purchase-money absolutely, and to the other moiety absolutely as heiress-at-law of her deceased co-owner, while Thomas Henry Campion claimed to be entitled to the latter moiety as administrator of deceased. The question submitted by the Examiner was whether the moiety of Elizabeth Campion was converted into personalty at the date of her death?

The facts are fully stated in the judgment.

Miles Kehoe, K.C., for Thomas Henry Campion:—

As the agreement for sale has been carried out, conversion must be held to have been effected as from the date of the agreement: *In re Sherlock's Estate* (1).

[He also cited *Kelly* v. *Enright* (2); *In re Estate of Martha E. Meade* (3); *In re Estate of James Armstrong* (4).]

Herbert Wilson, K.C., for Marianne Doyle:—

At the date of the death of Elizabeth Campion there was no binding agreement which could have been specifically enforced. There was no limit of time fixed by the agreement within which the

(1) [1899] 2 I. R. 561; 591.
(2) 11 L. R. Ir. 379.
(3) 40 I. L. T. R. 124.
(4) 41 I. L. T. R. 15.

Wylie, J. 1907.

In re Doyle's Estate.

conditions on which the carrying out of the agreement depended were to be performed. Accordingly, the agreement was void, as violating the rule against perpetuities: *London & South-Western Railway Company* v. *Gomm* (1); *In re Talbot Crosbie's Estate* (2): see judgment of Palles, C.B., at p. 580, and judgment of FitzGibbon, L.J., at p. 586; *Switzer* v. *Rochford* (3).

Feb. 7. Wylie, J.:—

In this case two sisters, Marianne Doyle and Elizabeth Campion, being entitled as tenants in common in fee to certain lands in the county of Carlow, entered into an agreement for the sale thereof to the occupying tenants under the Land Purchase Acts on the 1st August, 1904. On the 31st October, 1904, the vendors duly lodged with the Estates Commissioners an originating application for the purpose of carrying out said sale. On the 17th January, 1905, the Estates Commissioners made an order that, subject to the result of such further inquiries as may be made, the said lands may be regarded as an estate, and gave a direction as to the payment of interest in lieu of rent. On the application of the solicitors for the vendors, and on the authority of a letter signed by both vendors, a direction was given on the 19th May, 1905, that the interest in lieu of rent should be paid to Marianne Doyle, and the same was paid accordingly. On the 25th January, 1906, the report of the Inspector was received by the Estates Commissioners, and pursuant to that report the purchase agreements were sanctioned on the 23rd February, 1906.

Prior to such sanction, Mrs. Campion, one of the vendors, died intestate, and without issue, on the 28th January, 1906, leaving her husband, Thomas Henry Campion, and her said sister, Marianne Doyle, her heiress-at-law, her surviving. On the 12th March, 1906, Thomas Henry Campion obtained letters of administration to his deceased wife; and on the 22nd June, 1906, an order was made continuing the proceedings in the names of Marianne Doyle and Thomas Henry Campion, as administrator of Elizabeth Campion. On the 19th July, 1906, the whole purchase-money of

(1) 20 Ch. D. 562. (2) [1905] 1 I. R. 570. (3) [1906] 1 I. R. 399.

the several holdings comprised in the estate, which was by a minute of same date finally declared to be fit to be regarded as a "separate estate," was paid into the Bank of Ireland, and the usual vesting and charging orders were made.

On settling the allocation schedule the vendor, Marianne Doyle, claimed one moiety of the residue of the purchase-money absolutely in her own right, and the other moiety absolutely as heiress-at-law of her deceased co-owner; and Thomas Henry Campion claims the latter moiety as administrator of the deceased owner, on the ground that, on the facts above stated, the moiety of the deceased co-owner was converted into personalty at the date of the death of Mrs. Campion, and belongs to him, as her administrator. This question has been reserved for my decision by the Examiner, and has been argued before me by Mr. Kehoe, K.C., for Thomas Henry Campion, and by Mr. Wilson, K.C., for Marianne Doyle.

In the arguments of counsel two questions were raised—(1) Was there a valid agreement, binding on and enforceable against Mrs. Campion, for the sale of her moiety at the time of her death? and (2), if there was, in the events that have happened, was her moiety converted into personalty at the time of her death? I did not understand Mr. Kehoe to contend, nor do I think he could contend successfully, that if the agreement was not valid and binding and enforceable against Mrs. Campion at the time of her death, conversion of her moiety into personalty could be effected, as of that date, by anything that has occurred since. On the other hand, Mr. Wilson did not appear to me to contend that, if there was such a valid agreement, conversion did not take place prior to the death, the agreement for sale being afterwards sanctioned and carried out, and, if he did, I would decide against him on that point, being satisfied to base my decision on the judgment of Lord Justice Holmes in *In re Sherlock's Estate* (1), the first five pages of which deal fully with this question, and that portion of the judgment not being, I think, questioned or affected by the other judgments in that case. Therefore, it seems to me that the only question I have really to decide in this case is the first question above mentioned, viz.:—Was the agreement, above referred to, a

(1) [1899] 2 I. R. 561; 591.

Wylie, J. 1907.

In re DOYLE'S ESTATE.

valid and binding agreement, enforceable against Mrs. Campion at the time of her death?

The validity of this agreement was challenged by Mr. Wilson on one ground only, viz. that, there being no limit of time fixed by the agreement within which the conditions, on which the carrying out of the agreement depended, must be performed, the agreement is void as a violation of the rule against perpetuities; and in support of that contention, counsel referred to the case of *The London & South-Western Railway Company* v. *Gomm* (1), and the references thereto in the cases of *Talbot Crosbie's Estate* (2) and *Switzer* v. *Rochford* (3).

Now, in *The London & South-Western Railway Company* v. *Gomm* (1), by a deed, dated in August, 1865, which recited that the plaintiff Company were seized in fee of certain land which was no longer required for the purposes of their railway, the Company conveyed the land to G. P. in fee for £100, and G. P. covenanted that he, his heirs and assigns, would, at any time thereafter, whenever the land might be required for the purposes of the railway, and whenever thereunto required by the Company, on a six calendar months' notice, and on receiving £100, reconvey the land to the Company, and it was held that the covenant gave to the Company an executory interest in land, to arise on an event which might occur after the period allowed by the rules as to remoteness, and that it was invalid on that ground. In giving judgment, Jessel, M.R., after reading the covenant, says:—"Now that is unlimited in point of time, and it does not appear to me to be possible to insert a limit of time, because, to put in the words 'within a reasonable time,' or any other words limiting the time, would be exactly contrary to the intention of the parties. It is not only unlimited in point of time, but it is obviously intended so to be. The Railway Company do not want the land now, and they do not know that they will ever want it, but their bargain is, that whenever it may be required for the works of the Company, the owners or owner for the time being of the land are or is to convey to the Company. The very essence of the contract is that it should be indefinite in point of time."

(1) 20 Ch. D. 562. (2) [1905] 1 I. R. 570. (3) [1906] 1 I. R. 399.

Now, that being the effect of the agreement in that case, it followed, as a matter of course, if the rule against perpetuities applied to a case of contract, as the Court held it did, that the covenant was a violation of the rule, and was void.

But let us look at the contract in the present case—it is a contract for sale under the Land Act of 1903. Under the provisions of that Act every agreement for the sale of a holding is, and must be, conditional on the sale of an "estate" of which the holding forms a part (see sects. 1–7 of the Act), and in order that any lands may constitute an "estate" under the Act, the Estates Commissioners must declare them fit to be regarded as a "separate estate" for the purpose of the Act (see sect. 98). In the case of a direct sale, as in this case, it is also an essential condition to carry out the agreement that an application should be made for an advance of the purchase-money, and that the Estates Commissioners should sanction such advance. This latter condition also applied to all agreements for sale under the Land Purchase Acts, prior to 1903, and the forms for such agreements were so framed. And so, under the Rules made in pursuance of the provisions of sect. 23, sub-sect. 13, of the Act of 1903, for carrying into effect the prior provisions of the Act as to sales, the prescribed form for an agreement for sale is conditional in its terms, and could not be otherwise. Rule 19 of the above Rules requires that agreements for sale under the Act shall be in the prescribed form, and, accordingly, on the 1st August, 1904, the vendors in this case entered into an agreement for sale in such form with their four tenants, the first clause of which is in these terms—"In case an estate of which the said holdings form a part shall be sold under the provisions of the Irish Land Act, 1903, the vendors hereby agree to sell, and each of the tenants hereby agrees to purchase, the holding, described in the schedule opposite the name of each such tenant, respectively, for the respective sums specified in said schedule, being the whole purchase-money of each holding respectively." Clause 3 provides—"Each tenant hereby applies to the Irish Land Commission for an advance of the whole of the said purchase-money for the purpose of said purchase," and the agreement then contains provisions as to the vesting of the lands charged with the annuities, and as to the sporting and mineral rights,

Wylie, J. 1907.

In re Doyle's Estate.

in accordance with the Act. And the provisions of the Act requiring, and the parties having it in contemplation, that some substantial period must elapse before the sale can be carried out; the 7th clause of the agreement provides, that the tenant-purchasers shall pay interest on their respective purchase-moneys, from the date of the agreement up to the dates of the respective advances.

Rule 1 of the above Rules provides that proceedings for sale under the Act of 1903, by a vendor, for sale of an estate to persons other than the Land Commission, shall be commenced by an originating application in a prescribed form, and, accordingly, the vendors in this case, in accordance with the Rules, lodged an originating application with the Estates Commissioners, on the 31st October, 1904, and the above agreement for purchase and application for an advance was lodged in December, 1904. Pursuant to these applications, the Estates Commissioners directed their Inspector to inspect the holdings comprising the estate, and make the necessary inquiries, and report to them the result. All this was done, and the report made on the 25th January, 1906, prior to the death of Mrs. Campion. Now, it is contended on behalf of Marianne Doyle, the other vendor, who was a moving party in all these proceedings, and who has, since the death of her co-owner, in conjunction with her co-owner's administrator, carried out the sale to completion on foot of the above agreement, that the said agreement was void by reason of its violating the rule against perpetuities. There might be a question whether Mrs. Doyle, by her own action in carrying out the agreement for sale, is not now estopped from questioning its validity; but I prefer to decide this case on the general ground raised by her, because if her contention is good in law, every one of the thousands of agreements already lodged with the Estates Commissioners is invalid.

Now, what is the effect of the agreement of the vendor in this case? It is a present agreement for sale to be carried out under, and in accordance with, the provisions of the Act of 1903, and the Rules made thereunder, containing all the essential elements of a valid contract fixed and specified. But it does not fix any time for completion or within which the necessary conditions for completion must be fulfilled; and the contention is that this absence

of a time-limit invalidates the agreement. In an ordinary case, if no time is fixed for completion in an agreement for sale, it is, I think, well settled that the law would imply a reasonable time, and, if either party were guilty of any unreasonable delay, the other could by a notice fix a reasonable time, compel completion, or at the expiration of such time rescind. This power of either party, thus to compel completion or rescind, prevents the contract in such a case from tying up the property beyond reasonable limits.

In the case relied upon by Mr. Wilson, *The London & South-Western Railway Company* v. *Gomm* (1), as pointed out by the Master of the Rolls in the passage I have quoted from his judgment, the implication of a reasonable time would contradict the terms of the agreement, and be contrary to the expressed intention of the parties; but there is nothing in the agreement in this case inconsistent with the implication of a reasonable time, or to prevent either party from insisting that the agreements should either be carried out or rescinded within a reasonable time. Besides, the agreement in this case is made subject to Rule 20 of the above Rules, which requires the agreement for sale to be lodged with the Estates Commissioners within two months from its date. And Rule 40 provides that in case of undue delay the person having carriage shall be required, by notice, to attend and explain delay, and the Commissioners may transfer the carriage, or dismiss the proceedings, so that, in this way also, the agreement can either be completed or got rid of within a reasonable time.

I am, therefore, of opinion that the agreement for sale in this case was valid and binding on Mrs. Campion at the time of her death; and, in the events that have happened, the estate must be deemed to have been converted at the time of her death; and that her moiety of the proceeds goes to her personal representative.

Solicitor for Thomas Henry Campion: *D. O'Connell Miley.*
Solicitors for Marianne Doyle: *Brown & M'Cann.*

J. E. W.

(1) 20 Ch. D. 562.

Barton, J.
1907.
Feb. 27, 28.

HUNTER *v.* ALLEN.

(1906. No. 521.)

Graft—Expired lease—Tenants in common—Fiduciary relation—License and goodwill—New lease.

When a lease held by tenants in common has expired, and the lessees' interest is determined, and no tenancy or interest continues or has sprung up in the former co-owners of the lease, there is no necessary incapacity which debars one of such tenants in common from obtaining a new lease to himself personally, if he does not abuse or take an inequitable advantage of his position, and if the lessor has power to give, and intends to give, it to him to the exclusion of the other former co-owners.

But such a tenant in common cannot claim to hold a new lease for his own benefit if it is established—(1) that a fiduciary relation had been created, by agreement or conduct, between the tenants in common with reference to the old lease, or to an essential part of the subject-matter of the lease; or (2) that the lessee had obtained the new lease after representing to the lessor, and causing him to believe and intend, that the new lease was to be for the benefit of all the co-owners; or (3) that the new lease was obtained by the use of a right or rights which a Court of Equity would recognize as having been attached to the common property, *e.g.* a license and goodwill attached to licensed premises.

ACTION.

By indenture of lease dated 23rd of March, 1849, Charles Putland demised to James Kilbee part of the lands of Carrinagoolawn, containing 26A. 2R. 20P., in the county of Wicklow, for three lives, and the survivor of them, at the rent of £6 4*s*. The premises were known as the Woodenbridge Hotel, and there was a publican's license for the sale of intoxicating liquors attached thereto.

All the estate and interest in this lease of the premises thereby demised had become and were at the date of his death vested in George Hunter, senior.

George Hunter, senior, died on 10th September, 1895, and by his will, dated 15th March, 1895, he devised the premises to his

wife, Eliza Hunter, upon trust for his children, as she should think proper, and appointed her his executrix.

George Hunter, senior, left five children surviving at his death, viz.:—Catherine Mangan, Sarah Allen (one of the defendants herein), Lily Glover (the other defendant herein), George Hunter, jun. (the plaintiff), and Joseph Banks Hunter.

On the death of George Hunter, senior, Eliza Hunter went into possession of the premises, and carried on the business of a hotel-keeper therein, as trustee under the will, for herself and her children until her death.

Eliza Hunter died intestate on 3rd July, 1900, without having made any division or appointment of the premises among her children.

The plaintiff averred in paragraph 7 of the statement of claim that "it was then [*i.e.* at the death of the mother] arranged by the children of the said George Hunter, senior, that the defendant, Lily Glover (then Molony), who was the eldest child, . . . should obtain administration to the said Elizabeth Hunter, and as such administratrix obtain a transfer of the license into her own name, and manage and carry on the said business as trustee for herself and the other children of the said George Hunter, senior, including the plaintiff. This arrangement was carried out and acted on until the year 1902, when she married her present husband, and transferred the said license to the name of the said Sarah Allen, who has since carried on said business as such trustee under a similar arrangement between the members of the family."

The statement of defence contained no traverse of these allegations.

The lease of 1849 expired on the 26th March, 1904, and on the 7th April, 1905, the landlords, through their solicitor, gave notice to Sarah Allen, who held the license and was managing the hotel, that the lease had expired, and that they intended to take up possession. On the 11th July, 1905, they issued a writ and statement of claim in ejectment on title, and for overholding, making Lily Glover, Sarah Allen, and George Hunter, jun., defendants. Lily Glover and Sarah Allen entered a defence in the action through their solicitor, Mr. Hearn. In this action, George Hunter,

Barton, J. 1907.

HUNTER v. ALLEN

jun., was separately represented by a separate solicitor, but did not deliver any defence.

By a consent entered into in the above-mentioned action on the 15th May, 1906, between the plaintiffs and the defendants, Sarah Allen and Lily Glover, the action was settled on the following terms:—(1) Consent for judgment and possession against all defendants who had entered a defence; (2) provision for plaintiffs' costs; (3) plaintiffs to execute a new building lease for ninety-nine years to the defendant, Lily Glover; (4) the new lease to be of the lands in occupation of the defendants, save 5A. 11R. 20P. between the road from Ovoca and the railway (which the defendants surrendered), at a rent of £70, the new lease to commence as from the 1st of May, 1906, and rent at the rate reserved under the lease of 1849 to be payable at the old rate up to that date. The defendants covenanted to expend at least £200 in permanent buildings within three years from date of lease. They also covenanted and agreed that the new lease should be a demise of a hotel, with accommodation-lands attached, and not an agricultural or pastoral holding within the meaning of the Land Acts, and also that it should contain all usual covenants between landlord and tenant applicable to an improvement or building lease, and all covenants to maintain and use the buildings for hotel purposes, and to uphold the publican's license attached to the premises, and maintain same against forfeiture; also proviso for re-entry for breach of any of the covenants. George Hunter was not a party to this agreement.

In paragraph 10 of the statement of claim there was an averment that, in the course of the negotiations which preceded the above-mentioned agreement, the agent of the landlords stated that any consent he would enter into should be without prejudice to the rights of George Hunter, and that the defendants, before the consent was signed, acquiesced in this statement. There was also an averment that the defendants made use of the fact that the license was in the name of the defendant, Sarah Allen, as a lever to induce or compel the plaintiffs in that action to enter into the said consent. These averments were traversed by the defendants in the present action.

The evidence offered at the trial consisted chiefly of a corre-

spondence conducted between the parties through their respective solicitors, and between the parties' solicitors and the landlords' solicitor, the effect of which fully appears from the judgment of Barton, J.

The plaintiff, George Hunter, junior, claimed :—

(1). A declaration that the defendants were trustees of the premises known as the Woodenbridge Hotel and the license attached thereto upon trust for the plaintiff and the other children of George Hunter, deceased.

(2). A declaration that the plaintiff, with the other children of George Hunter, senior, was entitled to the benefit of the compromise and consent entered into on the 15th May, 1906.

(3). A declaration that the lease referred to in the said consent would be a graft upon the previous interest of the plaintiff, and the other children of the said George Hunter, deceased, in the said licensed premises and the license thereto attached, and upon the lease dated 23rd March, 1849, and that the plaintiff was now entitled as tenant in common to one undivided share of and in the tenant's equitable interest in the said premises.

Ronan, K.C., and *James O'Connor*, for the plaintiff :—

The new lease is clearly a graft on the old one, as on the facts the parties who procured it from the landlords were clearly in a fiduciary position. They negotiated with the landlords on behalf of the Hunter family for the new lease, and the license and good will attached thereto, and the *onus* is on them to show that there was nothing inequitable in their claiming the benefit of the new lease for themselves. The present case is thus clearly distinguishable from *Dempsey* v. *Ward* (1). There the lease had come to an end, and the landlord had power to let to anyone he pleased. In such a state of facts there is nothing *per se* to entitle the members of the family of a previous tenant to a graft. The present case falls within the principles relating to the doctrine of graft recognised in *Ex parte Grace* (2) ; *In re Biss* (3) ; *Egan* v. *Stack* (4) : *Griffith* v. *Owen* (5).

(1) [1899] 1 I. R. 463.
(2) 1 Bos. & P. 376.
(3) [1903] 2 Ch. 40.
(4) [1906] 1 I. R. 320.
(5) [1907] 1 Ch. 195.

Barton, J. 1907.

HUNTER v. ALLEN.

Miles Kehoe, K.C., and *Carrigan*, for the defendants :—

The plaintiff has disentitled himself to relief by his conduct. He refused to join with the defendants in resisting the ejectment proceedings, and allowed the defendants to defend at their own cost and expense. He cannot, therefore, be allowed to take any advantage under the compromise entered into in that action on the faith of his having disclaimed any interest in the premises. The new lease was never intended to be a graft. The area is not the same as the old area; the rent is different as well as the character of the premises.

Here the old lease has come to an end, and the defendant Lily Glover, by honest dealing, at her own expense and cost, has acquired a new lease. In such a state of facts there can be no graft: *Dempsey* v. *Ward* (1). The doctrine of graft only applies to leases with a right of renewal: *Bevan* v. *Webb* (2). There is no fiduciary relation in the present case, which does not subsist between tenants in common: *Kennedy* v. *De Trafford* (3); or between joint tenants: *Palmer* v. *Young* (4); or partners: *Featherstonhaugh* v. *Fenwick* (5). It is not the true rule of law that if any person only partially interested in an old lease obtains from the lessor a renewal, he must be held a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances under which he obtained the new lease: see judgment of Romer, L.J., in *In re Biss* (6) at page 60. *Ex parte Grace* (7) was a case where a minor's interest was in question. *Griffith* v. *Owen* (8) was a purchase of an estate of minors through the connivance of a mortgagee. A license is not property at all: see *Brennan* v. *Dorney* (9), where an administrator was held to be entitled to the value of a license which, without him, would have come to an end.

James O'Connor, in reply :—

It is a rule of law that if a lease is advantageous the *cestuis que*

(1) [1899] 1 I. R. 463.
(2) [1905] 1 Ch. 620.
(3) [1896] 1 Ch. 762; [1897] A. C. [180.
(4) 1 Vern. 276.
(5) 17 Ves. 298.
(6) [1903] 2 Ch. 40.
(7) 1 Bos. & P. 376.
(8) [1907] 1 Ch. 195.
(9) 21 L. R. Ir. 353.

Barton, J. 1907.

HUNTER v. ALLEN.

trustent may take the benefit of it; if not, the trustees must bear the loss. Of course, the trustee has a lien on the estate for costs and expenses. The difference in area and rent is beside the question. The defendant, Sarah Allen, cannot deny that she is a trustee of the premises. She must also be deemed to be a trustee of the license which she held and could only get as such trustee in possession of the premises. The license and goodwill cannot be segregated. Where one of a number of tenants in common holds a license and uses it as a lever to get a new lease, he cannot hold it for his own benefit. The premises were held by the defendants on an express trust by agreement between the parties; but apart from that the defendants have acted in the trusts in such a way as to amount to the creation of an express trust by their conduct: *Soar* v. *Ashwell* (1).

March 16.

BARTON, J.:—

The question for decision is whether this new lease, when obtained, will be a graft upon the previous interest of which plaintiff was one of the co-owners.

Plaintiff, in the first place, relies on the absence of any traverse or contradiction of the allegations contained in paragraph 7 of the statement of claim, which are to the effect that, after the death of their mother in 1900, the defendants held the license and managed and carried on the business of this hotel as trustees for themselves and for the other children of George Hunter, senior, including the plaintiff. I cannot suppose that it was by inadvertence that these allegations were left untraversed in the statement of defence and uncontradicted by any evidence. I observe that in their defence to the ejectment action, which the landlord commenced in July, 1905, the present defendants alleged that their mother had been in possession of these premises as "trustee" under old George Hunter's will, and that after her death the lease became vested in Lily Glover, "subject to said trust." If Lily Glover was in a fiduciary position towards plaintiff, the presumption against her of incapacity to hold the lease to his exclusion would be an irrebuttable presumption of

(1) [1893] 2 Q. B. 390.

Barton, J. 1907.

HUNTER v. ALLEN.

law: *per* Collins, M. R., *In re Biss* (1). But this case need not be decided upon admissions in pleadings. Even if there was no express fiduciary relation, there are other sufficient grounds for holding, as an inference of fact, that defendants obtained the lease under circumstances which make it inequitable for them to claim to hold it to the exclusion of the plaintiff.

The first inference of fact which I draw from the correspondence is that defendants represented to the lessor that they were seeking a new lease, not for their own benefit, but for the benefit of the Hunter family, that is to say, of the five Hunter children, including the plaintiff. I shall refer to a few of the passages which support that inference. On 19th April, 1905, defendants' solicitor, Mr. Hearn, wrote to Messrs. Toomey, the landlord's solicitors, a letter headed "Hunter's Estate and Woodenbridge Hotel," in which he said:—"It is the desire of *all parties interested* to sell the premises, and I trust the agent will recommend the granting of a new lease on fair terms." Again, he wrote to Messrs. Toomey on 22nd April:—"I will now ask you to submit an application to Mr. Tailyour (the agent) that a lease be granted to the *five children of the late Eliza Hunter.*" Again, on 5th May, he wrote to Messrs. Toomey that his clients would fall in with any proposal by the landlord to get an improving tenant, "providing it is arranged that the value of *their license, etc.*, is definitely agreed on. Most likely, too, an incoming tenant might think *the Hunter goodwill* of appreciable value." On 12th May he wrote again to Messrs. Toomey, referring to the question of negotiating with *the Hunter family.* Early in 1906 the landlord allowed Hearn to advertise the premises for sale as held under a lease for ninety-nine years, which he was prepared to give so as to enable the premises to be sold. In a letter of 2nd February, 1906, Hearn represented to the landlord the subject-matter of the proposed sale as "the Hunters' interest in the goodwill, license, etc." The sale did not come off; and the ejectment case came on for trial on 15th May, when the action was settled upon terms which included the granting of this new lease. I think that these extracts, which

(1) [1903] 2 Ch. 40, at p. 56.

might be multiplied, justify the inference that the defendants represented to the lessor that they were negotiating for a lease on behalf of the Hunter family. I also think that they justify a further inference that they were using the "Hunter license" and the "Hunter goodwill" as inducements to the landlord to grant the lease.

The next inference which I draw from the correspondence is that the landlord acted on these representations, and believed and intended that this lease, although it was to be in the name of Lily Glover, was to be for the benefit of the Hunter family, including plaintiff. I need only refer to two letters. In a letter of 1st May, 1905, Messrs. Toomey wrote on behalf of the landlord that they were directed to state that he "is not in the least hostile to *the Hunter family*," but that he wished to get clear possession, and that "when that has been done, the application of *the Hunter family* will be definitely dealt with by him." After the settlement of the action, Mr. Hearn wrote to the landlord asking that George Hunter should be evicted from the premises, and suggesting that such had been the intention of the landlord. Messrs. Toomey wrote on 31st May, 1906, that these statements "were entirely without foundation," and on 1st June Messrs. Toomey again wrote:—"We are informed Mr. George Hunter has issued a writ claiming a declaration that the proposed lease (*which it was intended to be*) is a graft on the old interest." To this Mr. Hearn replied that it was an impertinence for the landlord to make any statement as to his intention in the matter of the new lease. I think, however, that it is a material circumstance that the landlord believed and intended that this lease was to be a graft in favour of the plaintiff and the other owners of the old lease.

The defendants' main ground of complaint against plaintiff is that he severed himself from their line of defence in the ejectment proceedings. They say that he was playing for his own hand, and that he ought not to be allowed to share the fruits of their resistance. It is true that there was a divergence of policy and of interest. The others wished to have the premises sold. Plaintiff wished to become tenant and carry on the business. But they were all agreed that, in either event, their several rights were to

Barton, J. 1907.

HUNTER v. ALLEN.

be respected. Plaintiff took up the position that, if he obtained the lease, he would undertake to give to the others a reasonable sum to represent their shares. This was made clear by his solicitor's letters dated 30th October and 29th November, 1905, and 2nd April, 1906. The defendants, on the other hand, took up the position that, if they obtained and sold the new lease, they were willing to pay one-fifth of the purchase-money to plaintiff. This appears from their solicitor's letters of 12th January, 17th January, 28th March, and 5th April, 1906. This was the common understanding down to April, 1906. In the following month the new lease was obtained. What justification was there for defendants' claim to exclude plaintiff from its benefits?

It remains to apply the law to the inferences of fact which I have drawn. Romer, L.J., in *In re Biss* (1), at pp. 60, 61, referred to some of the circumstances under which persons not in a fiduciary position have been held to be constructive trustees—"as, for instance, by representing to the lessors or by inducing or allowing the lessors to believe, that they were acting in the interest of those entitled to the old lease." At the end of his judgment, at p. 64, he observed that the defendant in that case "had not used any right that a Court of Equity can recognise as belonging to other persons to enable him to obtain the lease." But that is how the defendants used the license in this case. The license was not property in the ordinary sense of that term. But, coupled with the goodwill of the licensed premises, it constituted a right or rights which a Court of Equity will recognise under such circumstances. It was capable of being used, and was in fact used, as a "lever," for the purpose of inducing the landlord to grant a new lease, because it was obvious that if the premises were evicted and the interest in the premises severed from the license, the consequence might be that the license might not survive the severance, and that the landlord or his new tenant might have to incur the risks which are incidental to an application for a new license. On the other hand, if a new lease was granted to the Hunters, and their interest afterwards sold to an improving tenant, there would

(1) [1903] 2 Ch. 40.

be no difficulty in obtaining a transfer of the license to their assignee. It was, to quote FitzGibbon, L. J.'s, words in *O'Brien's Case* (1), the interest of all parties "to endeavour amicably to arrive at some *modus vivendi* under peril of losing the license if they cannot agree."

As regards the other questions which arise in the case, very little more need be said. It is, of course, well settled that tenants in common of real or chattel real property do not, as such, stand in a fiduciary relation towards each other: *Kennedy* v. *De Trafford* (2). A fiduciary relation, or a partnership, may be shown to have arisen, or to have been created, among them by conduct or by agreement; but, if so, the inference must be drawn from other facts than the mere existence of a tenancy in common in the lands or premises. When a lease held in common expires, and the lessees' interest is determined, and no tenancy or interest continues or has sprung up in the former owners of the lease, there is no necessary incapacity which debars one of the tenants in common from obtaining a new lease to himself personally, if he does not abuse or take an inequitable advantage of his position, and if the lessor has power to give and intends to give it to him to the exclusion of the other former co-owners. I may refer to what was said by FitzGibbon, L.J., in *Dempsey* v. *Ward* (3), at pp. 475, 476, as to the position of the members of the family of the previous tenant of an expired tenancy. That was a useful case, because it served to remind us that the frontiers of the doctrine of graft have in this country been reached; and that the doctrine should be cautiously applied. But the facts of *Dempsey* v. *Ward* (3) are quite unlike those of this case. I have already referred to *In re Biss* (4). Collins, M.R., in that case, classified grafts from the point of view of burden of proof. But the inferences of fact are so clear in the present case, that it is not necessary to discuss the question of burden of proof.

There are three elements in this case, any one of which would render it inequitable for defendants to claim to hold this lease to the

(1) 6 L. R. Ir. 129, 136.
(2) [1896] 1 Ch. 762; [1897] A. C. 180.
(3) [1899] 1 I. R. 463.
(4) [1903] 2 Ch. 40.

Barton, J. 1907.

HUNTER v. ALLEN.

exclusion of plaintiff. First, we have it admitted on the pleadings that the defendants are affected by a fiduciary obligation towards the other tenants; secondly, it has been established, as an inference of fact, that the defendants obtained the lease by representing to the lessor, and causing him to believe and intend that the new lease was to be for the benefit of all the co-owners; thirdly, it has been established, as an inference of fact, that the lease was obtained by the use of a right or rights which a Court of Equity would recognize as having been attached to the common property. Any one of these three elements might be deemed to be sufficient to make it inequitable for one tenant in common to claim to retain such a lease for his own benefit. They are all present here, and make this, in my opinion, an exceptionally strong and clear case for the application of the doctrine of graft.

The defendants are, of course, entitled to contribution from plaintiff towards the expenses which they incurred in defending the ejectment action and in obtaining the lease, the amount of which can, in the absence of agreement, be ascertained by an inquiry. As regards the costs of the action, I see no reason why they should not follow the result.

Solicitors for the plaintiff: *M. J. O'Connor & Co.*
Solicitor for the defendants: *Hearn.*

J. MAC M.

In re O'KEAN, Deceased.
(FERRIS *v.* O'KEAN.)

Barton, J.
1906.
Nov. 17.
Appeal.
Dec. 14.

Administration suit—Costs of personal representative in default to the estate—Solicitor for defaulting administrator.

A personal representative, who has been ordered, in an administration suit, to bring in money due by him to the estate, will not be allowed any costs in the suit until he has complied with the order. His solicitor cannot be in any better position, and will not be allowed credit for such costs, in accounting for moneys received by him as such solicitor, until his client has brought in the balance due by him.

This was a creditor's suit, commenced by originating summons, for the administration of the estate of Michael O'Kean, deceased, who had been a publican and trader carrying on business in Newry. The assets consisted principally of book-debts. Michael O'Kean died on the 25th February, 1899. On the 20th March, 1899, the creditors met and unanimously passed a resolution to the effect that administration should be taken out by a brother of deceased named Joseph O'Kean, and that the books should be handed over to Mr. Hunter Moore, solicitor, to realise the debts due to deceased, and distribute the amounts collected by him rateably among the creditors. Pursuant to this resolution of the creditors, Joseph O'Kean took out administration, and Mr. Hunter Moore collected the debts due to the estate and distributed an amount equal to 10*s.* in the £ rateably among the creditors. Afterwards, Joseph O'Kean was adjudicated bankrupt, and had not obtained his certificate; and, the creditors being dissatisfied with the administration of the estate, brought this summons for the administration of the estate of the deceased, in which Joseph O'Kean was made defendant. Mr. Ferris, the plaintiff in this suit, was a creditor who had been a party to the resolution of the 20th March, 1899. In the course of the action, in which Mr. Hunter Moore acted as solicitor for Joseph O'Kean, Joseph O'Kean was ordered to bring in a balance of £200 due by him

Barton, J. 1906.

FERRIS v. O'KEAN.

as administrator to the estate, and he failed to comply with that order. Afterwards, an order was made on the 26th March, 1906, directing Mr. Hunter Moore to give an account of moneys received by him and paid by him as solicitor for the defendant. The Chief Clerk, in his certificate, certified that Mr. Hunter Moore had received £1106 5*s.* 1*d.*, and had duly paid away £705 9*s.* 6*d.* This left a balance due by him of £400 15*s.* 7*d.* This sum represented costs due to him, for which he claimed credit as against the moneys received by him. About half of this amount consisted of costs incurred before the action in collecting debts pursuant to the resolution of creditors of the 20th March, 1899; and the balance represented costs in the suit incurred as solicitor for the defendant in the course of the administration summons. Mr. Hunter Moore now moved the Court to vary the Chief Clerk's certificate by allowing him this sum of £400 15*s.* 7*d.*

Michael Dunn, K.C., and *Donaldson*, for Mr. Hunter Moore, referred to *Blundell* v. *Blundell* (1).

Cusack, for the plaintiff, relied on *Stamar* v. *Evans* (2) and *Kearney* v. *Kearney* (3).

BARTON, J.:—

Mr. Hunter Moore is, in my opinion, entitled, having regard to the special arrangement which was agreed to by the creditors, to take credit in this account for the costs incurred by him in realizing the debts due to the deceased. He realized those debts, and distributed them among the creditors, prior to this action, in pursuance of a resolution of the creditors, including the plaintiff, which authorized him to collect and distribute the debts. That amounted almost to a retainer or promise of indemnity on the part of the creditors. At all events, they cannot now be heard to oppose Mr. Hunter Moore being allowed credit for those costs as against the debts which he collected in pursuance of that resolution.

But, as regards the defendant's costs incurred in this suit, I think the Chief Clerk was right in disallowing those costs as a

(1) 40 Ch. D. 370. (2) 34 Ch. D. 470. (3) C. A., unreported, July 24, 1906.

credit in Mr. Hunter Moore's account. When the plaintiff, on behalf of himself and the other creditors, instituted this action, Mr. Hunter Moore was not under any obligation to act as solicitor for the defendant. When he undertook to do so, he ran the risk which every solicitor runs who undertakes to represent a personal representative in an administration suit. That risk was an obvious one in this case, because the defendant had become an uncertificated bankrupt. A personal representative is not entitled to his costs in the suit while he is in default to the estate. His solicitor cannot be in a better position. He cannot claim credit for the costs due to him by the administrator, in accounting for money received by him, until his client brings in the balance which is due by him to the estate. That was decided by the Court of Appeal in a case from this Court—*Kearney* v. *Kearney* (1). Accordingly, I must order Mr. Hunter Moore to bring in the balance of this account. This may operate somewhat hardly in this case, because Mr. Hunter Moore is quite blameless in the matter. But I may point out that he might, before incurring these costs, have made an application to the Court, upon notice to the creditors, for any special order which the exceptional circumstances of the case might have justified. No such application was made, and no sufficient grounds have been put forward for departing from what must be regarded as a general rule of practice in this Court.

Barton, J.
1906.

FERRIS
v.
O'KEAN.

W. M'G.

Mr. Hunter Moore appealed to the Court of Appeal against so much of the order as disallowed the costs of the action.

Appeal.
Dec. 14.

Dunn, K.C., and *Donaldson*, for the appellant.

Cusack, for the respondent.

THE COURT OF APPEAL (Sir Samuel Walker, C., and Fitz-Gibbon and Holmes, L.JJ.) dismissed the appeal without calling on counsel for the respondent.

Solicitor for the applicant: *Hunter Moore.*
Solicitors for the plaintiff: *Sheridan & Russell.*

R. D. M.

(1) Unreported, July 24, 1906.

Wylie, J.
1907.
Feb. 4, 7.

IN THE MATTER OF THE ESTATE OF THE EARL OF BANDON

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48, *sub-s.* 1 *—Proviso—"Estate"—"So incumbered that the vendor is not entitled to receive for his own use any part of the rents or profits thereof"—Temporary insolvency as to income—Date of ascertainment.*

"Estate," in the proviso to s. 48, sub-s. 1, of the Irish Land Act, 1903—"where an estate is so incumbered"—means the estate as defined in sect. 98.

Solvency as to income at the date of sale is the test to be applied in considering whether an estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents and profits thereof; and the fact that a receiver has been appointed for the purpose of (*inter alia*) paying off arrears of interest, the existence of which makes the estate at the date of sale temporarily insolvent as to income, does not bring the case within the proviso.

QUESTION arising on the ruling of the final schedule as to whether the bonus should be paid to the vendor or should be added to the purchase-money?

The facts, as appeared from the judgment, were as follows:—

By a deed, dated the 10th December, 1873, certain lands were mortgaged by the vendor to the Representative Church Body for the sum of £90,000. Subsequently, by another deed, dated the 12th May, 1876, the same lands were mortgaged by the vendor to the Provident Life Office for the sum of £10,500. Negotiations for the sale of these lands to the occupying tenants, under the Irish Land Act, 1903, were commenced about September, 1903, and in March, 1904, agreements for sale were completed, subject to the provisions of the Act. For convenience of sale the lands were divided into three distinct parcels, and each of these parcels formed the subject-matter of a separate originating application, and each was duly declared by the Estates Commissioners to be fit to be regarded as a "separate estate." The sale thereof was duly sanctioned. The lands were vested in the tenant purchasers, and the purchase-money was lodged in bank.

At the time of the passing of the Irish Land Act, 1903, and

at the date of sale, the gross rental of the estate was £5,655; the entire outgoings were £5,134, leaving an annual surplus profit rent of £521, or £238, after deducting receiver's fees. A receiver had been appointed by the vendor over the estate by a deed, dated the 22nd May, 1902. Under the deed the receiver was bound to apply the rents and profits in payment of (1) rates and taxes; (2) 5 per cent receiver's fees; (3) certain costs; (4) the interest due and to accrue due to the Representative Church Body; (5) the interest due and to accrue due to the Provident Life Office; and (6) the surplus rents and profits to the Earl of Bandon. The receiver had entered into receipt of the rents, under the deed, and had applied them as therein provided. At the date of sale there was due to the Representative Church Body over £6,712, and to the Provident Life Office over £1,800 for arrears of interest. It appeared that the purchase-money of these lands was insufficient to discharge the capital sums due on foot of the mortgages. It also appeared that, in addition to these lands, other lands of which the vendor was tenant for life, had also been sold. These had been the subject-matter of four separate originating applications and declarations. It was admitted that the bonus was payable to the vendor in respect of these.

The Right Hon. J. H. Campbell, K.C., H. D. Conner, K.C., and *A. M. Sullivan*, for the vendor :—

The case does not come within the proviso to sect. 48, sub-sect. 1. "Estate" there means the entire property sold. We are entitled to take into consideration the settled property in addition to the mortgaged property. If "estate" meant the estate as defined in sect. 98, the owner of an estate which was insolvent could add on portion of a solvent estate, so as to make the whole solvent, and having had the entire declared a "separate estate," thereby secure the bonus for himself. Taking the figures on the mortgaged property alone, in the normal condition of affairs, there would be a surplus coming to the vendor, *i.e.*, after deducting the gross outgoings from the gross rental actually payable. This is the only method by which it is possible to ascertain whether the vendor is entitled to any part of the annual income. The existence of arrears of interest, and the appointment of the receiver to pay them

Wylie, J. 1907.

In re BANDON'S ESTATE.

off, only deprives the vendor temporarily of his right to receive any part of the rents and profits. It was not intended that the proviso should apply in cases where, from some temporary cause, the small margin of profit has, for the time being, disappeared at the time of sale.

W. M. Jellett, K.C., and *C. H. Darley*, for the mortgagees :—

"Estate" in the proviso means the estate subject to the mortgages. As these are charged on three sets of lands, each of which has been declared a "separate estate," it is immaterial whether they are segregated or treated *in globo*. The real and substantial question is—Was the estate on which the mortgages are charged insolvent as to income at the date of sale? Even if the rents had been paid in full, they would have been quite insufficient to discharge the arrears of interest due at the date of sale. The fact that from the date of the receiver deed the vendor has received nothing from the estate, while all the time the arrears of interest have been accumulating, shows clearly that the case comes within the proviso. The fact that the estate is insolvent as to capital, also the fact that the penal rate of interest has been allowed to run, emphasizes the argument of insolvency as to income. You cannot bring in the settled estates in order to show that the vendor was receiving some part of the rents and profits at the date of sale.

Feb. 7.

WYLIE, J. :—

On the ruling of the schedule in this case a question was raised by the incumbrancers on the estate of the vendor as to whether the bonus was payable to him, or should be added to the purchase-money? The question has been referred to me for my decision. All parties interested were represented by counsel, and the case was fully argued.

The facts are shortly these. Certain lands of the Earl of Bandon were, by a deed of the 10th December, 1873, mortgaged by him to the Church Representative Body for the sum of £90,000. Subsequently, by a deed of the 12th May, 1876, the same lands were mortgaged to the Provident Life Office for the sum of £10,500. Negotiations for the sale of these lands to the occupying

tenants, under the Irish Land Act, 1903, were commenced about September, 1903, and in March, 1904, agreements for sale were completed, subject to the provisions of the Act. For convenience of sale the lands were divided into three distinct parcels, and each of these parcels formed the subject-matter of a separate originating application, and each was duly declared by the Estates Commissioners to be fit to be regarded as a "separate estate." The sale thereof was duly sanctioned. The lands were vested in the tenant purchasers, and the purchase-money was lodged in bank.

In that state of facts the bonus became payable under sect. 48 of the Act of 1903. But it is contended by the mortgagees that, under the proviso to sub-sect. 1 of sect. 48, it must be added to the purchase-money, and not paid to the vendor. The words of that proviso are—"Where an estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents or profits thereof . . . the percentage shall be added to the purchase-money, and shall not be paid to the vendor." Now the meaning of these words appeared, I presume, to the draftsman, and to the legislators who enacted them, to be perfectly plain, clear, and precise, and would probably so appear to an ordinary reader, but when you come to apply them to concrete cases, they appear, to me, at all events, a perfect puzzle.

In the first place, a good deal of discussion took place as to the meaning of the word "estate." Does it mean the entire estate of the vendor? or the entire lands subject to the mortgages? or, as defined in section 98, "any lands which the Estates Commissioners may declare fit to be regarded as a 'separate estate' for the purposes of the Act"? I have no doubt in my own mind that it bears the defined meaning, and I think the cases of *Leonard's Estate* (1) and *Minhear's Estate* (2) show that my predecessor, the Master of the Rolls, who so fully considered all these questions, took the same view. This being so, each of the three parcels sold as a separate estate ought strictly to be considered separately; but, as they are all subject to the same charges, I think the same result would follow from taking them *in globo*, and all parties have agreed in this.

(1) 38 I. L. T. R. 204. (2) *Ibid.* 215.

Wylie, J. 1907.

In re BANDON'S ESTATE.

But, then, what is the meaning of "so incumbered that the vendor is not *entitled* to receive any part of the rents and profits for his own use"? Does it mean at the time of the passing of the Act, or at the time of sale? It cannot mean, I think, any later date, because no rents or profits of the lands sold are payable after the date of the agreements. But which of the other two dates is the time at which the title to receive is to be ascertained? Well, as the bonus is expressly given as an aid to the sale, it appears to me that the time of ascertainment must be the date of sale.

But the greatest difficulty still remains. What is the meaning of "*so incumbered* that vendor is not entitled to receive any part of the rents and profits"? Does it mean that, at the date of the sale, the yearly outgoings properly payable equal or exceed the yearly rents and profits, so that there is no annual surplus which the vendor is entitled to receive? And is that the only meaning? or, where such an annual surplus exists, would the existence at the date of sale, of unpaid arrears of outgoings sufficient to use up such surplus profit, for one, two, ten, or twelve years to come, bring the case within the proviso? Suppose a vendor had an estate with a gross rental of £1000 a year, and annual outgoings of £700, leaving a net profit rent of £300 per annum, and suppose that for two years prior to the sale he had received all the rents, and paid no outgoings, leaving £1400 due for arrears of outgoings at the date of sale, is that estate so incumbered that vendor is not entitled to receive any part of the rents and profits for his own use? If so, would a like result follow if the arrears were only £400 instead of £1400? If not so in either case, would the result be different if, prior to the sale, a receiver had been appointed over the estate to receive all rents and pay all outgoings, both in arrear and accruing, and the surplus (if any) from year to year to the vendor?

Now the position of this estate at the passing of the Act and at the date of sale was this. The gross rental of the estate was £5655; the entire outgoings were £5134, leaving an annual surplus profit rent of £521, or £238, after deducting receiver's fees. If the case stopped there, there could, of course, be no question as to vendor's right to the bonus. But it appears that, by a deed of the 22nd May, 1902, the Earl of Bandon appointed a receiver over the estate, who was bound under the deed to apply

the rents and profits in payment of (1) rates and taxes, (2) five per. cent. receiver's fees, (3) certain costs, (4) the interest due and to accrue due to the Representative Church Body, (5) the interest due and to accrue due to the Provident Life Office, and (6) the surplus rents and profits to the Earl of Bandon. The receiver entered into receipt of the rents under the deed, and had applied them as therein provided. At the date of sale there was due to the Representative Church Body over £6712, and to the Provident Life Office over £1800 for arrears of interest. It is plain on the facts that, neither at the passing of the Act, nor at the date of sale, was the vendor entitled to receive any part of the rents and profits for his own use, nor would he, if the estate had not been sold, have been entitled to receive any for very many years to come.

Does then the existence of these arrears of interest bring the case within the proviso? I was not referred to any case, nor have I been able to find any, except *Ely's Estate* (1), that throws any light on this question.

In that case, the Marquis of Ely had, in 1902, filed a petition for sale before the Land Judge, and an order for sale had been made. The estate had for three years been in the hands of a receiver, appointed in an English Chancery action, for the purpose of raising out of the rents and profits, a sum of £26,000, and the Marquis had not received for those years, nor was he then entitled to receive, any part of the rents and profits; but the estate was absolutely solvent as to income, and it was only by reason of the receiver being in receipt for a temporary purpose that the Marquis had been and was then disentitled to the receipt of any part of the rents. After the Act of 1903 an application was made to the Land Judge to decide the question of whether, if the petition were dismissed, and a sale were made to the tenants out of Court, the Marquis would be entitled to the bonus for his own use. The Land Judge held he would not. But after this the law was altered by the Act of 1904, and a fresh application to dismiss the petition for the purpose of selling under the Purchase Acts out of Court was granted. And it is plain from the report (2) that the Land Judge

(1) [1904] 1 I. R. 66. (2) [1905] 1 I. R. 413.

Wylie, J. 1907.

In re BANDON'S ESTATE.

and the counsel on both sides were of opinion that the Marquis would, on the sale taking place out of Court, be entitled to the bonus for his own use, notwithstanding the fact that he was not then, nor for many years before, in receipt of any part of the rents and profits, nor was he then entitled to the present receipt of any part thereof, though, if the estate had not been sold, he was then entitled to the future receipt of the net rents and profits as soon as the temporary purpose for which the receiver had been appointed was satisfied. The expression used both by counsel and the Land Judge as indicating their view of the meaning of the words in the proviso that we are dealing with, was "solvency as to income." This, it seems to me, expresses the only definite and reasonable meaning that can be given to the clause. It cannot, I think, have been the intention of the Legislature that a vendor, who was entitled to an estate perfectly solvent as to income, should be deprived of the bonus, because at the date of the passing of the Act or at the date of sale, or at any other date, he happened to be deprived of the receipt of the net rents and profits by reason of a receiver being over the estate for a temporary purpose, or from some other temporary cause; and if this be so, I do not think I am at liberty to put any limit to the number of years that may elapse, in any particular case, before the net rents and profits can come to the vendor's hands again.

On considering the facts of this case as they existed at the date of the Act, or at the date of sale, I am not satisfied that, if no sale had taken place the vendor would not, at some future time, have received some part of the rents and profits of this estate, and, therefore, in my opinion, the proviso does not apply, and the vendor is entitled to the bonus for his own use.

Solicitor for the vendor: *Clifford Lloyd.*

Solicitors for the mortgagees: *Maunsell, Darley, & Orpen.*

J.E.W.

SWEENEY *v.* COOTE.

H. L.
1907.
April 16.

Conspiracy—Wrongful acts—Injury—Injunction.

Appeal by the plaintiff (*in formâ pauperis*) from the judgment of the Court of Appeal ([1906] 1 I. R. 92), reversing the judgment of Barton, J. (*ibid.*, 51).

Vesey Knox, *K.C.*, and *Stebbing* (of the English Bar), for the appellant.

The Right Hon. James H. Campbell, *K.C.*, and *Percival C. Gaussen*, for the respondent, were not called on.

The House of Lords (Lord Loreburn, C., Earl of Halsbury, and Lords Macnaghten, James, Robertson, Atkinson, and Collins) affirmed the judgment of the Court of Appeal, holding that there was no evidence of conspiracy on the part of the respondent to injure the appellant, or unlawfully to induce persons to withdraw their children from the school in which the appellant was a teacher (1).

Solicitor for the appellant: *Herbert Deane* for *Joseph Smith.*
Solicitors for the respondent: *Jordan & Lavington* for *Edward V. Hamilton.*

(1) Weekly Notes, 20th April, 1907, p. 92.

M. R. 1907.

Feb. 25. March 2.

In the MATTER of MARIE LOUISE CHARLOTTE PAVITT, an Infant.

(1907. No. 198.)

Infant—Guardian—Jurisdiction—British subject resident in Ireland—Property in France—Application on Summons—Ord. LV., R. 3 (9).

The Court has jurisdiction, on summons, to appoint a guardian of the estate of an infant, a British subject resident in Ireland, but having no property except personal estate in a foreign country.

Summons.

This was an application on behalf of Marie Louise Charlotte Pavitt, an infant, by Florence Pavitt, her next friend, that the said Florence Pavitt be appointed guardian of the estate of the said infant, and that the costs of the application be provided for.

The facts of the case were as follows :—

Marie Louise Charlotte Pavitt was an infant, aged sixteen years, born on the 7th March, 1891. She was the daughter of Arthur Pavitt and Charlotte Pavitt, who resided in Paris, and were British subjects.

Charlotte Pavitt died in September, 1893, and Arthur Pavitt died on 6th July, 1906, and did not appoint any person to be guardian of his daughter. The sole property to which the said infant was entitled was a legacy of 25,000 francs, payable to her on her marriage or on attaining the age of twenty-one years, under the will dated the 12th July, 1904, of her grand-uncle, M. Simon Didier Marotte Bussy, who died at Algiers on the 20th July, 1904. Under the terms of the will the income arising from the legacy was applicable to the maintenance and education of the infant. The legacy was, under the terms of the will, invested in the purchase of a perpetual annuity of 754 francs in the 3 per cent. Rentes, or French Government Stock. The certificate of the said stock was numbered 634, 575, series 7, and was in the possession of Maître Alfred Naret, of 50 Rue Etienne Marcel, Paris. It was

registered in the name of the infant as follows :—"Pavitt (Marie Louise Charlotte), an infant, under the legal guardianship of Arthur Pavitt, her father."

The annual interest on the legacy was paid to Arthur Pavitt down to the time of his death, but it had not been paid since his death, owing to the lack of any person who could give a proper receipt for it. The infant was a Roman Catholic, and residing at the Dominican Convent, Taylor's Hill, Galway, where she had been educated for the past two years. Florence Pavitt was a sister of Arthur Pavitt and paternal aunt of the infant and her nearest relation, and resided at the Convent of Mercy, Galway, and was a member of the community known as the Sisters of Mercy. These facts were deposed to in the affidavit of Florence Pavitt, filed the 19th February, 1907, who stated that she was informed by her legal advisers and believed that under the circumstances the French Courts would not appoint a guardian of the infant, but would recognize the authority of a guardian appointed by this Court to receive the interest payable to the infant as aforesaid.

An affidavit of the solvency and fitness of Florence Pavitt to be appointed guardian was made by Richard St. George, of Ely Place, Galway, a Commissioner for taking affidavits for the High Court.

R. G. L. Leonard, in support of the application :—

This is an application as to the guardianship of an infant, which a Judge of the Chancery Division has power to entertain on a summons in Chambers: Ord. LV., R. 3 (9), which corresponds to English Ord. LV., R. 2 (12); Annual Practice (1907), p. 742; *De Pereda* v. *Da Mancha* (1); *In re Lofthouse, an Infant* (2).

The Court has jurisdiction to appoint a guardian of the personal estate of an infant, if the infant is a British subject, although the infant is resident abroad and has no property in this country: *In re Willoughby, an Infant* (3), following *Hope* v. *Hope* (4). In

(1) 19 Ch. D. 451.
(2) 29 Ch D. 921.
(3) 30 Ch. D. 324.
(4) 4 D. M. & G. 328.

M. R. 1907. In re PAVITT.

In re Willoughby, an Infant (1), an order was made on summons. Here the infant is a British subject resident within the jurisdiction, but with no property in this country. The appointment of a guardian of her estate is necessary, as there is no person to whom the annuity can be paid. [He referred to Simpson on Infants (2nd ed.), p. 242; Daniell's Chancery Forms (5th ed.), p. 681; Seton on Decrees (5th ed.), vol. ii., p. 844; Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 13.]

March 2.

THE MASTER OF THE ROLLS:—

Mr. Leonard has established his case. *In re Willoughby, an Infant* (1), shows that this Court has jurisdiction, when the infant is resident within the jurisdiction, and is a British subject, to appoint a guardian, although the infant has no property in this country. Apparently all the property of this infant is invested in French Rentes, and I understand from the affidavit that the French Courts will not appoint a guardian of an infant not resident within their jurisdiction. With regard to the question whether this application is rightly made under Ord. LV., R. (3) (9), I entertain some doubt as to whether it is advisable to make an order of this kind under that Rule; but that there is jurisdiction to make such an order appears plain from *In re Lofthouse, an Infant* (2), and from the case already mentioned, *In re Willoughby, an Infant* (1), which, so far as I can see, was a proceeding under the corresponding English Rule. There being no question whatever save the question of appointing some proper person to receive the dividends on the investments belonging to the infant, and apply them for her benefit, I think that in this case I may dispense with the presentation of a petition, and make an order appointing Florence Pavitt guardian of the estate of the infant. The summons does not ask for a guardian of the person. If any difficulty arises, a more formal proceeding must be instituted.

The following order was made:—

"UPON the application of counsel for Marie Louise Charlotte Pavitt, an infant, by Florence Pavitt, her next friend, made on the 25th day

(1) 30 Ch. D. 324. (2) 29 Ch. D. 921.

of February last, and this day, pursuant to originating summons, dated the 19th day of February, 1907: on reading the said summons and the affidavit of Florence Pavitt, filed on the 19th day of February, 1907, and the documents therein referred to, and the affidavit of Richard St. George, filed on the 19th day of February, 1907, and on hearing what was alleged by said counsel, and the said Florence Pavitt, by her counsel, undertaking to account for all moneys to be received by her, when required so to do: It is ordered that the said Florence Pavitt be, and she is hereby, appointed, without giving security, guardian of the estate of the infant, Marie Louise Charlotte Pavitt, during her minority, or until further order; and the Judge doth certify for counsel."

Solicitors for the applicant: *F. M'Donnell & Co.*

W. L.

IN THE MATTER OF THE MUNSTER AND LEINSTER BANK, LIMITED; AND IN THE MATTER OF THE COMPANIES (MEMORANDUM OF ASSOCIATION) ACT, 1890 (53 & 54 VICT. c. 62).

(1906. No. 1296.)

Company—Memorandum of association—Alteration of objects—Extension to new business—Bank—Power to act as trustee and executor—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1—*Practice—Petition—Advertisement of.*

A company, carrying on the ordinary business of bankers, petitioned the Court to confirm a resolution, passed unanimously, to alter its memorandum of association by empowering it to undertake the execution of trusts, and to act as executor or administrator, or as trustee or treasurer.

The application was opposed by seven shareholders, who were solicitors, on the ground that the alteration would not be beneficial to the shareholders, and would be injurious to the solicitors' profession.

The Court confirmed the alteration, with the modification that the powers were not to be exercised unless some part of the trust property was situate within the jurisdiction of the Court.

Immediately after the presentation of a petition under the above Act a summons should be taken out to have a day fixed for the hearing of the petition, and directions given for advertising the presentation of the petition, in

M. R. 1907.

In re Munster & Leinster Bank.

accordance with the practice stated in Palmer's Company Precedents (1906 edition), part i, p. 1163.

PETITION.

This was an application by the Munster & Leinster Bank, Limited, to amend the memorandum of association pursuant to the Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62).

The company was incorporated in the year 1885, under the Companies Acts, 1862 to 1880, as a company limited by shares. The registered office of the company is at 66, South Mall, Cork.

The objects for which the company was established were set forth in clause 3 of the memorandum of association as follows :—

(*a*) To carry on the business of banking in all its branches; and in particular to advance money upon property and securities of all kinds; to discount bills, notes, and other securities; to deal in exchange and specie, and to receive money on deposit at interest or otherwise.

(*b*) To purchase, or otherwise acquire and undertake, or to conduct as agents, all or any part of the business, property, and liabilities of the Munster Bank, Limited, or of any other company or persons carrying on any business which this company is authorized to carry on, or possessed of property suitable for the purposes of this company.

(*c*) To establish and carry on banks, branch banks, and agencies in such places as may, from time to time, be determined.

(*d*) To purchase, take on lease or in exchange, hire, or otherwise acquire, any real or personal property, and any rights or privileges which the company may think necessary or convenient for the purpose of its business.

(*e*) To make, accept, indorse, and execute promissory notes, bills of exchange, and other negotiable instruments.

(*f*) To invest the moneys of the company not immediately required upon such securities as may from time to time be determined.

(*g*) To raise money in such manner as the company may think fit, and in particular by the issue of debentures, charged upon all or any of the company's property, both present and future, including its uncalled capital.

(*h*) To construct, maintain, and alter any buildings and any works necessary or convenient for the purposes of the company.

(*i*) To sell, improve, manage, develop, lease, mortgage, dispose of, or otherwise deal with, all or any part of the property of the company.

(*j*) To do all such things as are incidental or conducive to the attainment of the above objects.

By special resolution of the company duly passed and confirmed in accordance with section 51 of the Companies Act, 1862, at extraordinary general meetings of the company, held on the 1st December, 1906, and 18th December, 1906, respectively, it was resolved as follows, that is to say:—

RESOLUTION.

"That the memorandum of association of the Munster and Leinster Bank, Limited, be amended by adding to and at the end of sub-sect. (*a*) of clause 3 of the said memorandum the following words, viz.:—

"'And also to undertake and execute, either by the company or by an authorized officer of the company, either alone or jointly with any other trustee or trustees, any trusts, the undertaking whereof may seem desirable to the company, and also to act either by the company, or any authorized officer of the company, as executor or administrator of any deceased person, or as trustee or treasurer, and the undertaking of any duties in relation thereto or consequent thereon.'"

The petition, which was verified by the affidavit of Mr. Lillis, the general manager and a director of the bank, stated that the proposed extension of the objects of the company was required to enable the company to carry on certain businesses and classes of business which might conveniently and advantageously be combined with the business of the company, and that no one would be prejudiced by the proposed extension of the company's objects, and that it was just and equitable that the said special resolution for the proposed extension of such objects should be confirmed.

The petition accordingly prayed that the alteration of the company's objects proposed by the said special resolution therein set forth might be confirmed by the Court pursuant to the Companies (Memorandum of Association) Act, 1890.

The registered capital of the bank was the sum of £1,000,000 divided into 200,000 shares of £5, of which 100,000 shares had been issued, upon which £2 per share had been called up. It appeared from the last balance-sheet of the bank for the half-year ending 31st December, 1906, that the bank had no liabilities save the ordinary liabilities to depositors and customers having balances to the credit of their accounts, which liabilities amounted to the sum of £4,612,998 16*s.* 3*d.*, and that the bank had assets to meet these liabilities amounting to the sum of £5,132,705 13*s.* 4*d.*,

M. R. 1907.

In re Munster & Leinster Bank.

showing a surplus of asets over liabilities amounting to £519,706 17*s.* 1*d.*

The bank was established in the year 1885, and paid a dividend to its shareholders ever since its establishment. The dividend paid for many years prior and up to the year 1898 was £10 per cent. per annum. The dividend paid for the years 1899 to 1902, inclusive, was £11 per cent. per annum, and since the year 1902 the dividend paid each year was £12 per cent. per annum. The said shares upon which only £2 was paid have and had been selling on the Stock Exchange at prices ranging from £5 10*s.* to £5 15*s.* per share, and were then selling at £5 17*s.* 6*d.* per share. Notice of the extraordinary general meeting of the bank called for the 18th December, 1906, for the purpose of confirming the special resolution passed by the company on the 1st December to alter and amend the memorandum of association, was published in the *Irish Times*, the *Freeman's Journal*, the *Daily Express*, the *Irish Daily Independent*, the *Cork Herald*, and the *Cork Constitution* of the 7th December, 1906.

On January 11th, *O'Connor*, *K.C.* (*Lillis* with him), mentioned the matter at the sitting of the Court, and asked the Master of the Rolls to fiat the petition, and dispense with the service of notices, as the only interests affected were those of the shareholders, with whose authority the petition was presented. The Registrar referred to an order in Chambers made in the case of the Royal Bank on June 6th, 1904, directing advertisements of the hearing of the petition. No such order had been applied for, and therefore the petition had not been fiated.

The Master of the Rolls, without deciding the question of the practice to be followed, fiated the petition, and directed it to be heard on January 15th.

Jan. 15.

O'Connor, *K.C.*, and *Lillis*, in support of the petition :—

The Court has power under the Act of 1890 to confirm the alteration of the memorandum of association, "if it appears that the alteration is required in order to enable the company—(*d*) to carry on some business or businesses which, under existing cir-

cumstances, may conveniently or advantageously be combined with the business of the company," sect. 1 (5) (*d*). The business of trustee and executor is one that may be conveniently combined with the ordinary business of the company. The only question is as to notice. There are no debenture-holders here, and no creditors, except depositors, who are not entitled to object; they can withdraw their moneys at any time. There are no rules of Court prescribing the practice to be adopted under the Act. In Palmer's Company Precedents (8th ed.), part. i., p. 1163, the practice is stated to be that a summons should be taken out for directions as to advertisements and to fix a date for the hearing of the petition, and a form of summons and order is given. It is submitted, however, that advertisements are not necessary here; the resolution has been advertised already, and it is desired to obtain the order of the Court before the half-yearly meeting on January 23rd.

THE MASTER OF THE ROLLS:—

The advertisements in the newspapers and notices convening the extraordinary general meetings are sufficient as regards the shareholders, but it is a different matter as to creditors; no notice has been given to them by advertisement or otherwise. Before confirming the alteration proposed the Court must be satisfied: "(*a*) that sufficient notice has been given to every holder of debentures or debenture stock of the company, and any person or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and (*b*) that with respect to every creditor who, in the opinion of the Court, is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt has been discharged or has determined, or has been secured to the satisfaction of the Court: Provided that the Court may, in the case of any person or class of persons, for special reasons, dispense with the notice required by this section."

There are in the present instance creditors who are, in my opinion, entitled to object, and no special reasons have been assigned to induce the Court to dispense with the notice to them. I should be the last to raise any technical difficulty if the proposed extension of the objects of the company was a trivial

M. R. 1907.

In re Munster & Leinster Bank.

one. I do not so regard it. The proposed extension may involve a considerable increase in the business of the company, with, of course, a corresponding increase in the liabilities of the company. The addition proposed to be made to the memorandum of association is as follows:—"And also to undertake and execute either by the company, or by an authorized officer of the company, either alone or jointly with any other trustees, any trusts, the undertaking whereof may seem desirable to the company, and also to act either by the company, or by any authorized officer of the company, as executor or administrator of any deceased person, or as trustee or treasurer, and the undertaking of any duties in relation thereto or consequent thereon." I must say that, having seen the balance-sheet of the company, I should think that the addition if made would probably result in a very large volume of new business being entrusted to the company. We have not got in this country any general public trustee. The want of some such officer is very great, and when a banking company, of good position and standing, offers to undertake and execute trusts, it would appear to me that a good deal of business would probably result. Here the creditors, who have entrusted their money to the bank on deposit receipt, or even on current account, are, in my judgment, entitled to be heard, and I confess I am not able to state, as I am asked to do, under sect. 1 (2) of the Act, that there are special reasons why notice to them should be dispensed with. I see no special reasons except the natural anxiety of the bank, having regard to the wishes of the shareholders, to carry the new policy into effect at the earliest possible opportunity; and if I were to grant this application without insisting upon the notice contemplated by the section being given, I should be creating a bad precedent. The Registrar of the Court pointed out to me when this case was mentioned on the first day of the present sittings that the practice as stated in Palmer's Company Precedents has been followed by my predecessor, Sir Andrew Porter, and he referred particularly to an order made in the case of the Royal Bank in 1904; but I was pressed to hear the petition, and I allowed it to be listed for to-day. I shall in future follow the practice as stated at p. 1163 of Palmer (1906 edit.), and require a summons for directions to

be taken out immediately after the presentation of a petition of this description. I shall adjourn the hearing of this petition for three weeks from this date, and direct that meanwhile notice of the adjourned hearing be given by advertisement in the newspapers, and also in the *Dublin Gazette*.

The petition was duly advertised pursuant to the said order. An affidavit in opposition to the petition was made by Mr. R. A. Macnamara, solicitor, a shareholder of the bank, and filed on his behalf by Mr. W. G. Wakely, solicitor for the Incorporated Law Society. In this affidavit Mr. Macnamara stated that he considered that it would be objectionable that the bank should obtain power to undertake and execute trusteeships, or power to act as executor or administrator; that in his opinion the powers sought by the bank were not such as could be conveniently or advantageously combined with the business of the bank; and that the execution of such powers would probably cast upon the bank liabilities injurious to the interests of its shareholders, and such as might render necessary a call upon the unpaid capital of the bank. He referred to a copy of a resolution passed in Cork by the Southern Law Society, of November 18th, 1906, and to a copy of a resolution of the Incorporated Law Society, of December 12th, 1906.

The resolution of the Southern Law Society was to the effect that the powers proposed to be taken by the bank seriously and injuriously affected the solicitors' profession and their clients; that the fact of such powers being taken by certain banks in England was not a valid or substantial reason for the adoption of the practice in this country, where the conditions were entirely different, and there was no occasion whatever for such procedure; that in the opinion of the Association the condition made by the Union Bank of London as to employment of solicitors, which was circulated as that proposed to be adopted, was vague and unsatisfactory, and formed no adequate protection against the danger of their clients and their trust business being taken out of their hands.

The resolution of the Incorporated Law Society was that the

M. R. 1907.

In re Munster & Leinster Bank.

Council were of opinion that the proposed adoption of the power by the Munster and Leinster Bank to act as trustees, executors, and administrators, was inimical to the interests of the solicitors' profession in Ireland, and, if persisted in, should be opposed; that the exercise of such powers by the bank was likely to lead to an interruption of the friendly relations existing between the profession and the Court, and that the suggested undertakings offered by the bank would not prove of any permanent value; further, that a precedent would be created which other banks in Ireland would seek to follow, ultimately leading to the concentration of business connected with the administration of trusts in bank officials, to the detriment both of the profession and the public generally; and, further, that the office of trustee should not be held by a banker whose duty to his shareholders would conflict with and be inconsistent with his duty as trustee, and generally that the assumption of the powers indicated in the bank's notice would ultimately prove detrimental to the best interests of the shareholders of the bank.

An affidavit by Mr. Lillis in reply stated that as the result of inquiries he had ascertained that the Union of London and Smith's Bank, Limited, and the London and South-Western Bank, Limited, had pursuant to the powers conferred on them by the Companies (Memorandum of Association) Act, 1890, altered the terms of their memoranda of association so as to enable them to act as executors and trustees; also that under the terms of their constitution the Bank of England, the National Provincial Bank of England, and the London and County Banking Company had power to act as trustees and executors; also that several insurance companies had altered the terms of their constitution and memoranda of association to enable them to act as executors and trustees, including the Royal Exchange Assurance Corporation and the Commercial Union Assurance Company, Limited, the Alliance Assurance Company, Limited, and the London Assurance Corporation.

Feb. 19. The petition came on for hearing.

Ronan, K.C., O'Connor, K.C., and *Lillis*, for the petitioners:—

The application comes within sect. 1 (5) (d) of the Act. A bank can act as treasurer, and acts as such for local authorities under the Local Government Acts. The advantage of allowing a corporation to act as trustee or executor is obvious. The solvency of the trustee or executor is ensured, and no breach of trust is possible. The petition has been duly advertised, and there is no opposition except from seven shareholders, who did not attend the meetings, and oppose really in the interest of the solicitors' profession, of which they are members.

Herbert Wilson, K.C., for R. A. Macnamara and six other shareholders:—

The business to be added under sect. 1 (5) (d) means one that will be in the interest of the shareholders, and this is not shown. The Court should have regard to the interest of shareholders who were not at the meetings, even though very few in number; the petition does not state how many shareholders were present at the meetings. Very little pecuniary advantage can accrue to the bank if the proposal is sanctioned. It cannot charge for acting as trustee or executor, unless expressly authorized by the instrument appointing it. It cannot act as administrator, as it does not represent next-of-kin. Besides, it would incur responsibility; trust moneys could not be mixed with other moneys, or, if they were mixed, the bank would have to pay to the *cestui que* trusts whatever interest was made on the moneys.

If the bank was co-trustee with an individual, it might be liable for his default. Again, there is nothing to limit the operation of the proposed powers to Ireland.

In *In re Bernicia Steamship, Limited* (1), a company which had power to work only one steamship, applied to confirm an alteration in the memorandum to enable it to hold any number of steamships at the same time. No shareholder objected. Cozens-Hardy, J., made the order, but said it was such a sweeping change that he thought he would not have confirmed the alteration if

(1) W. N., 1900, p. 24.

M. R. 1907.

In re Munster & Leinster Bank.

any shareholder had opposed. *In re Governments Stock Investment Co.* (1) shows that confirmation of the resolution is not a matter of course. There the main purpose of the company was to invest in Government securities, and Chitty, J., refused at the instance of a minority of debenture-holders to sanction an alteration giving power to invest in securities not guaranteed by Government. On a subsequent occasion Chitty, J., made an order, on the company altering its name so that persons might not be misled, and complying with certain other conditions: *In re Governments Stock Investment Co.* (*No.* 2) (2). In *In re The Ulster Marine Insurance Co., Limited* (3), Sir Andrew Porter, M.R., sanctioned certain of the proposed alterations subject to modifications. No one opposed the application there. If the Court thinks that the application should be granted, the order should be made subject to the name of the company being changed: *In re Foreign and Colonial Trust Co.* (4); *In re Alliance Marine Insurance Co.* (5); *In re National Boiler Insurance Co.* (6).

O'Connor, K.C., in reply:—

There is nothing inconsistent with the main business of the bank in the present proposal. The bank is the depositee of trust moneys, though it does not take cognizance of trusts. It seeks to be a trustee of funds entrusted to it. It is not necessary to show that a large profit will result. The cases cited are not against our contention: In *In re Bernicia Steamship Co.* (7), the sweeping alteration there proposed was confirmed by the Court, the shareholders being unanimous. In *In re Governments Stock Investment Co.* (1), the application was refused because it was inconsistent with the main purpose of the company. That does not touch the present case. *In re The Ulster Marine Insurance Co., Limited* (3), was a different case. Sir Andrew Porter, M.R., sanctioned some of the alterations. *In re Foreign and Colonial Trust Co.* (4) is really in my favour. There is no reason for any change of name.

(1) [1891] 1 Ch. 649.
(2) [1892] 1 Ch. 597.
(3) 27 L. R. Ir. 487.
(4) [1891] 2 Ch. 395.
(5) [1892] 1 Ch. 300.
(6) *Ibid.* 306.
(7) W. N., 1900, p. 24.

The Master of the Rolls :—

So far as the proposed change relates to the undertaking and execution of the duties of treasurer there is no objection to the prayer of the petition. The opposition is confined to the proposed extension of the business of the bank to the business of trustee or executor. I am impressed by the fact that the seven gentlemen represented here to-day (who are shareholders, holding in all 398 shares) had full knowledge of the proposed alteration in the memorandum of association, and had due notice of the meetings of the company at which the special resolution was passed and confirmed, yet did not raise any objection, or take any exception, to the proposed alteration until the hearing of this petition. It appears from the affidavit of Mr. Lillis that the special resolution was passed without dissent, and was confirmed without opposition. If these seven gentlemen had even now come forward and opposed this petition, as shareholders, I should, perhaps, have given more weight to their objections, and to the arguments offered on their behalf; but the learned counsel who nominally appeared for them did not seek to deny, but rather prided himself on the fact, that he represented, not individual shareholders, but the Incorporated Law Society of Ireland and the Southern Law Society. I have read the resolutions passed by these eminent bodies, on which the present opposition is based, and in accordance with which the petition of the bank is resisted to-day, and it is apparent that they were framed not really in the interests of shareholders, but in apprehension of the injury which might result to the solicitor profession from the proposed extension of the objects of the bank. [The Master of the Rolls read the resolutions.] The apprehension is that the new business would prove so attractive that other banks in Ireland would follow the lead of the Munster and Leinster Bank, and that the general body of solicitors would, under the circumstances suggested, suffer no inconsiderable injury. Mr. Ronan and Mr. O'Connor urge that the resolutions demonstrate that the extension of the business of the bank would prove beneficial to the shareholders. Why should there be apprehension of sustained and severe competition unless the real truth is that the Munster and Leinster Bank have discovered

M. R. 1907.

In re Munster & Leinster Bank.

something new, something likely to be advantageous to their shareholders, and profitable in one way or another? I have evidence that the case comes within sect. 1 (5) (d), that is to say [The Master of the Rolls read the sub-section (1)]. I have the fact that, after the fullest notice, the shareholders at two meetings voted in favour of the enlargement of the bank's powers, and I have the fact that Mr. Lillis, the general manager, and a director of the bank, states to the Court on oath his opinion that the proposed extension of the objects of the company is required to carry on certain businesses and classes of business which may conveniently and advantageously be combined with the business of the company. Mr. Lillis is a business man, and, as manager of the bank, he should be, and, I think, he would be, the last person in the world to propose any change except in the interest of the bank and of its shareholders.

In support of the petition, I have positive statements, while, on the other side, I have nothing but vague apprehensions, vague fears; not so much that the bank or its shareholders may suffer, but that the general body of solicitors may suffer. Far be it from me to say that the eminent bodies whose duty it is to safeguard the interests of their profession were wrong in viewing the proposed new departure in banking business with some dislike; but I think that they have taken an exaggerated view of the situation, and apprehend misfortune which is not likely to occur. That this bank, or any other bank, would be able to carry out on a large scale the duties of executors or trustees, without the assistance of the general body of solicitors, is, to my mind, absolutely impossible. I am rather inclined to think that the proposed alteration, if carried into effect, would probably result in benefit to the solicitors' profession, as it certainly would result in benefit to the public in many respects. All these considerations are, however, beside the question. I am bound, as Mr. Wilson says, to concentrate my attention on the bank and the shareholders, and taking all the circumstances of the case into consideration it appears to me that material advantage may accrue to the bank, not so much from the few cases in which they may receive remuneration for their services, as from the attraction to customers

(1) See *ante*, p. 240.

arising from knowledge of the fact that they can rely upon the bank to act as their trustee or executor, in full confidence that property entrusted to the bank will be in safe custody; not liable to be lost or made away with by ignorance, negligence, or default.

I see good grounds for supposing that this knowledge and confidence may retain and attract customers, and thus ultimately result in benefit to the shareholders. At all events, so the great majority of the shareholders appear to think, and I see no reason why I should set the apprehension of the solicitors in opposition to the views of the shareholders. I, therefore, exercise the discretion which I possess by confirming the resolution, with one alteration. I do not think it desirable that any question should be raised as to the power of the bank to accept trusts in cases where the trust estate or property is situate altogether outside the jurisdiction of this Court. Some words must be inserted limiting the extended powers to cases where at least some portion of the trust estate or some portion of the assets is within the jurisdiction of the High Court of Justice in Ireland. As regards change of name, I am of opinion that the cases cited by Mr. Wilson are not such as to make it incumbent upon me to direct any alteration in the name of the bank. *In re Governments Stock Investment Company* (1) was a case where the Court when authorizing investments altogether outside the limit of investments indicated by the title of the company directed an alteration of name in order that persons dealing with the company might not be misled into supposing that its investments were limited to Government securities. This, if I may say so, was a typical case for change of name. On the other hand, in the case of *In re Bernicia Steamship Co.* (2), an alteration was made in the memorandum of association to enable a one-ship company to have and work any number of ships. Cozens-Hardy, J., though confirming the alteration, considered that such a "sweeping change" would have been more properly carried out by a reconstruction, and stated that if any shareholder had opposed he would not have confirmed the proposed alteration. However, he made the order prayed for, without any condition as to change of name—at least so far as reported.

(1) [1891] 1 Ch. 649; [1892] 1 Ch. 597. (2) W. N., 1900, p. 24.

M. R. 1907.

In re Munster & Leinster Bank.

Again, in the case of *In re Ulster Marine Insurance Company, Limited* (1), an alteration in the memorandum of association was sanctioned giving the company the power of effecting insurances so as to include risks in transit by land, yet Sir Andrew Porter, M.R., considered that there was no reason why the name of the company should be altered unless the shareholders desired it. In the case of the English companies referred to in the affidavits used on the present hearing it would appear that no change of name was made. The Union of London and Smith's Bank, and the London and South-Western Bank, did not make any change of name or add anything to their respective titles to indicate that they had undertaken the duties of trustees and executors in addition to their ordinary banking business. I see no reason in the present case why I should direct the name of the bank to be changed, and with the limitation I have indicated I confirm the proposed alteration.

March 28.

The Court made the following order :—

"The Court, being satisfied by the evidence aforesaid that the petitioners have not issued any debentures or debenture stock, and that sufficient notice has been given to every person, or class of persons, whose interests, in the opinion of the Court, will be affected by the extension of the objects of the petitioners, intended to be effected by the resolutions hereinafter mentioned, and that there are no creditors of the petitioners who will be so affected, doth, in pursuance of the provisions of the Companies (Memorandum of Association) Act, 1890, confirm the alteration of the memorandum of association of the said bank, with respect to the objects of the said bank, effected by the special resolution set forth in the schedule hereto, passed and confirmed at extraordinary general meetings of the said petitioning company, held respectively on the 1st December, 1906, and 18th December, 1906, with the addition of the proviso added thereto by the direction of the Court, as appears in the said schedule."

Schedule referred to.

That the memorandum of association of the Munster and Leinster Bank, Limited, be amended by adding to and at the end of sub-section (*a*) of clause 3 of said memorandum the following words, viz. :—

(1) 27 L. R. Ir. 487, 495.

"And also to undertake and execute, either by the company, or by an authorized officer of the company, either alone or jointly with any other trustee or trustees, any trust the undertaking whereof may seem desirable to the company, and also to act, either by the company or any authorized officer of the company, as executor or administrator of any deceased person, or as trustee or treasurer, and the undertaking of any duties in relation thereto or consequent thereon.

"Provided always, that nothing in this sub-section contained shall authorize the company, or any officer thereof, to undertake any trust, or act as executor or administrator, or treasurer, in any case in which no portion of the trust property, assets, or moneys, respectively, to be dealt with, is situate within the jurisdiction of the High Court of Justice in Ireland." (1)

Solicitors for the Munster and Leinster Bank: *Maxwell, Weldon, & Company.*

Solicitor for R. A. Macnamara: *W. G. Wakely.*

W L.

(1) After the judgment was delivered, and before the order was passed, the solicitors for the Munster and Leinster Bank obtained copies of orders dated April 18, 1905, May 3, 1906, and April 11, 1905, made in England in the matter of the Companies (Memorandum of Association) Act, 1890, in connexion with the Union of London and Smith's Bank, Limited, the London and South-Western Bank, Limited, and the Commercial Union Assurance Company, Limited, respectively. These orders were made by the Court without any restrictions being imposed.—[REP.]

M. R. 1905. Feb. 15.

THE ATTORNEY-GENERAL (AT THE RELATION OF O'DUFFY) *v.* MR. APPLETON, SURGEON-DENTIST, LIMITED, AND OTHERS.

Dentist—Registration—Joint stock company—Registration under Companies Acts—Dentists Act, 1878 (41 & 42 *Vict. c.* 33)—*Information—Public interest—Fraudulent evasion of statute—Injunction—Jurisdiction—Costs.*

Certain persons formed a company, under the Companies Acts, with the title of "Mr. Appleton, Surgeon-Dentist, Limited," for the following objects (*inter alia*), viz.—to carry on, through competent persons, the business of dentists, or dental surgeons, in the United Kingdom, and, for that purpose, to employ suitable persons, and to purchase, hire, or procure suitable instruments, furniture, and fittings; and they carried on and advertised such business. None of the directors or other persons forming the company was a qualified dentist, registered under the Dentists Act.

In an information by the Attorney-General, at the relation of the honorary secretary, Irish Branch of the British Dental Association, alleging that the company was formed for the fraudulent purpose of deceiving the public, by falsely representing that the business was carried on by persons registered under the Dentists Act, 1878, and for the purpose of injuring and defrauding persons duly registered under that Act, the company, the signatories to the memorandum of association, and certain directors named as special defendants, not delivering any defence, it being, however, admitted that the company was in liquidation:—

Held, that, the Attorney-General, suing in the public interest to prevent an admitted fraudulent attempt to evade statutory provisions, was entitled to an injunction, and that the costs of the proceedings should be paid by the special defendants.

MOTION for judgment in default of defence.

This action was brought by the Attorney-General, at the relation of Mr. Kevin E. O'Duffy (Honorary Secretary of the Irish Branch of the British Dental Association), and the writ of summons claimed an injunction to restrain the defendant company from carrying on business and from advertising for custom under, and from taking or using, the name of "Mr. Appleton, Surgeon-Dentist," or any name or style containing the name "dentist" either alone or in combination with any other word or words, or

any name, title, addition, or description, implying or reasonably calculated to induce the public to believe that the business carried on by the said company is conducted or carried on by a person or persons registered under the Dentists Act, 1878, or specially qualified to practise dentistry. The defendant company was a one-man company incorporated under the Companies Acts on the 21st March, 1904, and registered under the name of "Mr. Appleton, Surgeon-Dentist, Limited." The memorandum of association stated the following (amongst other) objects for which the company was established:—(*a*) To carry on, through competent persons, the business of dentists and dental surgeons in such parts of the United Kingdom of Great Britain and Ireland as the directors shall from time to time appoint, and in particular, Bangor, County Down, and Belfast; and for that purpose to employ suitable persons, and purchase, hire, and procure suitable instruments, furniture, and fittings; (*b*) To purchase, sell, and deal in artificial teeth and fillings, and to manufacture same in large or small quantities; (*k*) To adopt such means of making known the products and business of the company as may seem expedient, and in particular by advertising in the Press, by circulars, and by publication of books and pamphlets.

The statement of claim averred that the company was wrongfully and fraudulently formed with intent to injure and deceive the public and to injure and defraud persons registered under the Dentists Act. It also stated that the defendant company had been extensively advertised in the north of Ireland, and by reason of the formation and advertising of the company under their registered name the public had been, and were liable to be, led to believe that the business of the company was being carried on by persons registered under the Dentists Act, 1878, and that there was concerned with the management of the company one Mr. Appleton, who was a person registered under the said Act, and entitled to take or use the title of surgeon-dentist. It also alleged that the defendant company was formed and procured to be registered for an unlawful purpose—namely, for the purpose of imposing upon and deceiving the public by falsely representing to them that the business of the company was conducted or carried on by persons registered under the Dentists Act, 1878; and for the purpose

M. R. 1905.

ATTY.-GEN. v. APPLETON.

of injuring and defrauding persons duly registered under that Act, by depriving them of the fees and charges for the performance of dental operations and for dental attendance and advice, which were by the said statute made recoverable only by persons registered thereunder or by legally qualified medical practitioners; and for the purpose of taking and using the title "surgeon-dentist" against the provisions in that behalf of the Dentists Act, 1878.

It averred that the defendant company was not registered or capable of being registered under the Dentists Act, 1878, and that the business of the said company was not carried on by any person or persons registered under the Dentists Act, 1878, or entitled to take or use any name, title, addition, or description implying that he was so registered or that he was a person specially qualified to practise dentistry. The defendants, Frederick Appleton, and his wife Ethel Appleton, were the directors of the company, and the former was the managing director and secretary. The capital of the company was £500, divided into 500 shares of £1 each, all of which had been issued and allotted as follows:—To Frederick Appleton, 344 shares; to Ethel Appleton, 100 shares; to the defendant, Martha Stuart, 50 shares; the six other defendants had been allotted one share each.

The defendants delivered no defence.

Arthur Samuels, K.C., and *Gerald Fitz Gibbon*, for the relator:—

The facts are admitted on the pleadings. The defendant company was formed and exists for the purpose of perpetrating an audacious fraud, and the signatories to the memorandum of association, who are defendants, were not, in forming the company, "associated for any lawful purpose" within the 6th section of the Companies Act, 1862. They were engaged in a conspiracy to cheat the public. A company cannot be registered under the Dentists Act. This company is formed for the purpose of fraudulently arrogating for Appleton the title of "dentist" under cover of the company, and imposing on the public. The object of the Dentists Act is to protect the public from imposition, by enabling them to know whether persons practising

dentistry are specially qualified to do so. An unregistered person is not a dentist. The word "dentist" means, in law, a registered dentist. This company, therefore, holds out to the public a statement false in either aspect—either that the company is itself a registered dentist, which it cannot be, or that Appleton is a registered dentist, which he is not. This is a fraud on the public generally, and it is also a fraud on the members of the dental profession.

A company with such a name cannot be now registered under the Companies Acts: *The King (Rowell)* v. *Registrar of Joint Stock Companies in Ireland* (1). The case of *O'Duffy* v. *Jaffe* (2) only decides that once such a company is formed it cannot be made liable to the penalties imposed by the Dentists Act, 1878; but that case gave no sanction to the formation of such companies, which it treats as an evasion of the Dentists Act.

The Court has jurisdiction, at the suit of the Attorney-General, to restrain a fraud upon the public, and that notwithstanding that a new offence has been created by the Dentists Act, and a penalty imposed for its infraction: *Attorney-General* v. *Ashborne Recreation Ground Company* (3), *Devenport Corporation* v. *Tozer* (4), *Attorney-General* v. *Wimbledon House Estate Company* (5). The Dentists Act imposes a statutory obligation on all persons not registered under that Act not to assume the title of dentist. That statutory obligation is infringed by the defendant company, and the Attorney-General can restrain if in the public interest. The signatories and directors are liable to the injunction and to costs: *La Société Anonyme des Anciens Etablissements Panhard* v. *Panhard Lavassor Motor Co., Ltd.* (6). The company in the present case is still in existence: Companies Act, 1862, ss. 129, 131, 132.

W. J. Johnston, for the defendants, Frederick Appleton and Ethel Appleton, *contra*:—

The company has gone into liquidation and does not defend. There was an offer to wind up before the action was brought. No private interests have been damnified. The defendants should

(1) [1904] 2 I. R. 634.
(2) *Ibid.* 27.
(3) [1903] 1 Ch. 101.
(4) [1903] 1 Ch. 759.
(5) [1904] 2 Ch. 34.
(6) [1901] 2 Ch. 513.

M. R. 1905.

ATTY.-GEN. v. APPLETON.

not be made liable to costs. This is really a test proceeding by the Dental Association. Such a company can lawfully carry on business through duly qualified agents or assistants.

THE MASTER OF THE ROLLS (1) :—

This case comes before me on motion for judgment against the defendants and the company.

The statement of claim avers that the company was wrongfully and fraudulently formed with intent to injure and deceive the public, and to injure and defraud persons registered under the Dentists Act, 1878. There is no defence—that is to say, the defendants have admitted the truth of that averment by not denying it; they admit that they have not only violated the law, but that they have done it fraudulently. That averment is distinctly admitted; nor, indeed, could it be questioned upon the facts. The language used describing it as "an audacious fraud" is not a bit too strong. If there were no Act of Parliament at all bearing on the question, and if this were merely the case of a gentleman setting up on his hall-door a brass plate, "Mr. Appleton, Surgeon-Dentist, Limited," the word "limited" being either in large or small letters, the passer-by would suppose, beyond all doubt, that it belonged to a person who was a surgeon-dentist. But the word "Mr." would emphasize the suggestion that there was to be found within a person who was a surgeon-dentist. It is open to anyone forming a company, under certain restrictions, to register it in any name he pleases. But the persons who registered this company had obviously before their minds, apart from the question of whether it was legal or not, the intention of telling a falsehood, for the purpose of misleading the public to believe that there was a Mr. Appleton, a surgeon-dentist, to be found at the address given. The Dentists Act, 1878, is founded upon the highest public policy. The Act was passed for the purpose of preventing unqualified persons from holding themselves out as being qualified to practise as dentists. At one time, no doubt, dentistry was looked upon by some as a lower branch of science; it was once looked on as an inferior profession, if it could be called

(1) SIR A. M. PORTER.

a profession at all. But increasing knowledge has shown that it is an art that is capable of the highest development and extension, and just as those who are connected with other branches of the medical and surgical professions should have the highest qualifications, so it is most important that dentists should have special and particular qualifications.

Now, is this Act for the public benefit?

I find that everything in the Act proceeds on the assumption that it is. I do not criticize the case of *O'Duffy* v. *Jaffe* (1) at all. It is decided, and by that decision the Courts in this country are bound, and, whilst deferring to it, I, like Palles, C.B., express neither approval nor disapproval of it. The only real difficulty that has occurred to me in this case was that of jurisdiction. This is a new offence. There is a remedy provided under the Dentists Act—that is, by prosecution of the offender in a Court of summary jurisdiction. Generally speaking, where there is a new offence the remedy given by the statute creating the offence is exclusive. But the existence of power to sue for penalties does not of itself prevent the interference of the Attorney-General seeking an injunction in the interests of the public by way of information. The public interests are committed to the care of the Attorney-General, as representing the Crown, and in that way he represents the public. The Attorney-General has sometimes declined to allow proceedings to go on, even with a competent relator. But that is not the case here. The Attorney-General properly sues at the relation of the Secretary of the British Dentists' Association for the purpose of restraining a fraud upon the public. It is not necessary for him to show that any particular individual has suffered. This fraud may have succeeded, or it may not, in inflicting individual injury or loss. People may have imperilled their lives by committing themselves to the care of this limited liability dentists' company. The Attorney-General represents the Crown in this matter. He does not sue for punishment of the wrong done; he sues to stop its recurrence. The whole public are interested in stopping this organized system; and finding that there is no possibility of dealing with it under the

(1) [1904] 2 I. R. 27.

M. R. 1905.

ATTY.-GEN. v. APPLETON.

penal sections of the Acts, having regard to the decision of *O'Duffy* v. *Jaffe* (1), he takes the step of coming to the Court of Chancery for an injunction to stop this fraud. This is a case in which a fraud has been discovered. The Attorney-General says this is a matter affecting the whole public; and so it is. It is no answer to an application for an injunction to say that the offence here is an indictable misdemeanour. I have no doubt it is, because at Common Law it is an indictable misdemeanour to conspire to defeat an Act of Parliament. It is no answer to this application to say that the signatories to the memorandum of association could be criminally prosecuted. I have no doubt whatever that at Common Law they could all be prosecuted for conspiracy. The Attorney-General is entitled to apply to stop this fraud, and he is entitled to succeed. He is entitled to judgment against all the defendants, including the company, with costs. The company, it seems to me, has not been properly wound up; it is existing still in its corporate capacity. It could go on advertising, and doing business now, just as much as at any time since its formation.

Solicitors for plaintiffs: *Bradley & Son.*
Solicitor for defendants (the Appletons): *M'Cracken.*

R. W. L.

Barton, J. 1906.

Nov. 16, 21, 22, 23. Dec. 5.

IN RE RENEWABLE LEASEHOLD CONVERSION ACT; EX PARTE LANE AND OTHERS.

(1906. No. 633.)

Lease for lives renewable—Fines—Nomine pœnæ *clause—Demand—Waiver—Tenantry Act* (19 & 20 *Geo.* 3, *c.* 30, *Ir.*).

A "demand" within the Tenantry Act is not waived by a subsequent "demand," unless the latter is complied with within a reasonable time, and the previous delay may be taken into account in considering the effect of subsequent delay. But a lessor may waive the effect of a demand by

(1) [1904] 2 I. R. 27.

pursuing a course of conduct inconsistent with further insistence on it, especially after he has become aware that his conduct is being acted on by the other party to his detriment.

A lease for lives renewable for ever was renewed in 1840. The covenant for renewal was for renewal within twelve months after the falling of each life, upon payment of a fine. There was also a *nomine pœnæ* clause, providing for a penalty of 6*d.* a month in the event of neglect or refusal to pay fines within twelve months of the dropping of a life. The first life fell in 1863, but no fine was paid, and no renewal was taken out. There was no fraud or conduct amounting to refusal on the part of the lessees, whose agent believed that the lessees had, under the *nomine pœnæ* clause, the option of paying the fines and penal fines at any time before the end of the lease.

The lessors relied upon letters, written to T., agent for L., who was entitled to a moiety of the lessees' interest, between 1891 and 1901, as "demands" within the meaning of the Tenantry Act. It was questionable whether they were addressed by and to the proper parties as prescribed by that Act. Afterwards, in 1903, negotiations between the lessors and lessees for a fee-farm grant were re-opened. On the faith of these negotiations, and with a view to completing the grant, L. purchased for £800 certain undivided shares of other parties entitled to the lessees' interest, the existence of which was an obstacle to the completion of the grant; and other expenses were incurred by L. at the lessors' request. The purchase of these shares was made known to the lessors, who afterwards accepted the title and approved of the fee-farm grant in September, 1904.

After the fee-farm grant had been approved by the lessors in September, 1904, the fines were ascertained, and thenceforward the lessors knew that the lessees were ready and willing to pay the fines. The lessors then made a requisition, necessitating the execution of powers of attorney by persons in Belgium and Australia, which involved difficulty and delay. The lessors' agent wrote in January, 1905, reminding T. that the fee-farm grant had been approved in the previous September; and again, in September, 1905, he wrote, informing T. that he was instructed to place it on record that the last life had died, and that the lessees must now take the consequence of their neglect. This letter was based on a mistake of fact, as the last life had not died. T. wrote back at once, correcting the mistake, and informed the lessors' agent of the steps which were being taken to obtain the power of attorney in Australia. The lessors did not then press the matter further. The power of attorney was not available until May, 1906. The lessors then refused to execute a grant, and the lessees presented this petition:—

Held, (1) that, assuming that the letters written prior to 1901 contained effective "demands," made by and to the proper persons, in accordance with the provisions of the Tenantry Act, their effect was waived by the lessors in 1903 and 1904; (2) that the letters of January and September, 1905, were

Barton, J. 1906.

Ex parte LANE.

not effective "demands" within the Tenantry Act; (3) that, in the absence of any effective "demand" within the Tenantry Act, there was not such neglect or delay on the part of the lessees as would *per se* disentitle them to renewal; but that, under the circumstances, the petitioners should pay the whole costs of the petition.

Held, also, that the *nomine pœnæ* clause did not, if the lessor demanded the fines, give the lessee an option to put off paying them until the end of the lease, or at all events equity would not enforce the covenant in that sense; but, if no "demand" were made, the *nomine pœnæ* clause might cover a case of mere neglect to pay fines.

PETITION under the Renewable Leasehold Conversion Act. By their petition filed on 18th June, 1906, Agnes Lane and ten other persons who were beneficially entitled to the lessees' interest in a lease for lives renewable for ever, dated 25th April, 1786, asked for a declaration that they were entitled to a grant in fee-farm of the premises comprised in said lease. The covenant for renewal was for renewal within twelve months after the falling of each life upon payment by the lessees of a renewal fine of £5 3*s.* 3*d.*, Irish currency. The lease contained a *nomine pœnæ* clause providing for the imposition of a fine of sixpence per month in the event of the lessees refusing or neglecting to pay such fine within twelve months. The last renewal was dated 28th May, 1840, and of the three lives therein named one had fallen in in 1863, the second on or about 12th August, 1905, and the third on or about 5th May, 1906. No renewal fines had been paid.

The facts on which the questions in dispute between the parties depended were set out in the petition, affidavits, and correspondence.

The correspondence began with a letter of 12th May, 1891, from Mr. John J. Dudley to Mr. Walter Thornhill. The former was agent over the property, the rents of which he collected and paid to Mrs. Smyth, who was entitled to a jointure exceeding the amount of rents received. All letters written by or on his behalf prior to January, 1895, were written on behalf of Mrs. Smyth, the jointress. She died in 1895. Mr. Thornhill, to whom the letter was addressed, was agent and solicitor for Agnes Lane, who was

beneficially entitled to the rents and profits of about a moiety of the interest in the lease, including those of a part of the estate which had for many years borne the head-rent, in indemnification of all the owners. Mr. Thornhill was in the habit, on behalf of Agnes Lane, of paying the head-rent to Mr. Dudley, and of accounting for the part of the rents of the indemnifying lands to which the other lessees were entitled, to Messrs. Scanlan & Sons, of Cork, who were their agents; but neither Mr. Thornhill nor Agnes Lane knew what was the nature of the title or interest of the other lessees. In his letter of 12th May, 1891, which was entitled "Smyth Estate," Mr. Dudley wrote:—"A fee-farm grant is required to be taken out for the premises for which you pay me the rent of £42 1*s.* 10*d.* . . . The last renewal is dated the 28th May, 1840, and made to Messrs. Cogin and Cottrell for the lives of Michael M'Namara, Edward Gould, and Thomas Hayes, some or all of whom are probably dead. As besides the fine £5 3*s.* 3*d.*, Irish currency, on the fall of each life there is a special one which may be increasing, please see to the matter now." On the 13th May, 1891, Mr. Thornhill replied:—"One life (if not two) remains yet. I wrote the parties on the subject." Mr. Dudley wrote on 3rd December, 1891:—"Are the parties interested taking any steps to get a fee-farm grant as the fines are increasing?" On 19th February, 1892, Mr. Dudley wrote referring to his previous letter "pointing out that the lease under which you pay me £42 1*s.* 10*d.* on behalf of Miss Lane requires renewal"; and adding—"I will be glad to hear from you as to cause of delay in submitting the draft renewal." Mr. Thornhill's reply, dated 3rd March, 1892, stated:—"I am instructed that one of the lives is still in being, but that the fee-farm grant must, of course, be taken out if required." On 14th April, 1892, Messrs. O'Connor & Dudley, solicitors, wrote to Mr. Thornhill—"Referring to your letter of 3rd ult. to Mr. J. J. Dudley, we have been expecting to receive draft fee-farm grant. Kindly let us have it at once, as Mrs. Smyth requires payment of the renewal fines." On 23rd May, 1892, Messrs. O'Connor & Dudley wrote:—"What about sending draft fee-farm grant?" and on 24th May, Mr. Thornhill wrote

Barton, J. 1906. *Ex parte* LANE.

in reply:—"I have had some trouble in getting the material for fee-farm of Lackentubbermurry, owing to the premises having become sub-divided, and the documents scattered about from time to time. . . . I think it will be desirable to appoint new trustees before taking the grant. I am now in communication with the parties interested, and hope to get the matter under way without much further delay. I believe two of the lives in last renewal are still living." Messrs. O'Connor & Dudley wrote on 30th September, 1892:—"What about the fee-farm grant herein?" On 8th December, 1892:—"What about the fee-farm grant in this case? The matter has remained over too long"; and on 9th February, 1893:—"We have been directed by Mrs. Mary Smyth, the present landlady, to apply to you, as agent and solicitor for the tenants, for payment of the renewal *nomine pœnæ* fines, . . . and to call upon your clients to take out a renewal of the lease." In reply, Mr. Thornhill wrote on 11th February, 1893:—"My client is only entitled to certain parts and shares of this property, other portions of which are represented by Messrs. Scanlan & Sons, 69 South Mall, Cork, and though anxious to have fee-farm grant taken out, my difficulty is in getting at the right parties, consequent upon two or three recent deaths of those interested. Messrs. Scanlan are in communication on the subject, and I await evidence of title, &c., before preparing fee-farm grant for your approval. . . . I would be glad to know the amount of your client's claim." On 15th February, 1893, Messrs. O'Connor & Dudley wrote:—"We find that we have referred you to the wrong renewal, and, therefore, on behalf of Mrs. Smyth, have to ask that your clients should pay the renewal fines, &c., due on the renewal of the 28th May, 1840, to Mrs. Smyth, and take out a renewal or fee-farm grant."

The correspondence between the parties ceased from that date until after the death of the jointress, Mrs. Smyth, in 1895. Prior to her death all the letters addressed to Messrs Thornhill had been written on behalf of the jointress. On the 13th January, 1895, Messrs. O'Connor & Dudley wrote to Mr. Thornhill explaining how Mrs. Smyth had been entitled, and that Mr. Barton and Mr. Wise between them now represented the entire lessors' interest.

On the 2nd January, 1896, Mr. J. J. Dudley, the agent, wrote to Mr. Thornhill:—"What about the fee-farm grant? If not taken out as required, the lessees will lose their right to it." On the 14th January, 1896, Mr. Thornhill wrote to Mr. Dudley:—"I have draft fee-farm grant prepared, only waiting to insert names of grantees, for a considerable time back. It appears that some of the beneficiaries having died representatives had to be raised, which caused delay. My clients are most anxious to get the grant completed, but you must, at the same time, understand that the lives named in last renewal are not all dead yet. One still lives." The next letter was from Messrs. O'Connor & Dudley, dated the 14th January, 1898, referring to the previous correspondence, and adding:—"More than a reasonable time has now elapsed, and we must ask you to state definitely within one week from this date whether they are prepared to take out the grant or not. Our clients are quite tired of the delay, and insist upon our instituting the necessary proceedings to enforce their rights." On the 20th January, 1898, Messrs. Thornhill & Son wrote:—"We have communicated with the parties concerned as to taking out fee-farm grant of Lackentubbermurry. We understood the lives are not yet all dead, but it is clearly best for all parties to have grant taken out, and we have applied for the necessary documents to be able to prepare same without undue delay. In whom is the grantors' estate now vested? What do you propose as to the title, &c.?" Messrs. O'Connor & Dudley wrote again on the 22nd February, asking Messrs. Thornhill to write definitely without further delay, and on the 28th February, 1898, Messrs. Thornhill & Son wrote:—"We have draft fee-farm grant prepared awaiting names of proposed grantees, and are in communication with the solicitors for the beneficiaries, who are very numerous. We do not represent all, and title is being prepared for us. We are most anxious to have it disposed of, but would prefer having the title up to date before furnishing draft grant to you for approval, and would ask you, now that things are in training, not to press us for a little." From the date of this letter nothing was done until the 18th December, 1900, when Mr. Dudley wrote:—"What about the fee-farm grant? As I have already several times invited the lessees to take it out, the moment the

Barton, J. 1906. *Ex parte* LANE.

surviving life drops they will lose their interest, which appears to be a very valuable one. I think you might call their attention to the matter again." On the 4th May, 1901, Mr. Dudley again wrote:—"What about the fee-farm grant? As I have already several times written requiring it to be taken out, your clients, as you are of course aware, will lose their right to it (if they have not already done so) if the matter is not attended to." Messrs. Thornhill, replying on the 7th May, 1901, wrote:—"As to the fee-farm grant, we are much obliged for your reminder, but we can assure you it is giving us very considerable trouble. We have not yet succeeded in obtaining title to one of the shares of this property, but are in communication with English solicitors on the subject, and have reason to think that they will be able to trace the missing documents, which will enable us to perfect the title to the grant. We may, however, state that one of the lives in last renewal is still living."

Throughout this correspondence the lessors' agents communicated with nobody representing the lessees except Messrs. Thornhill, who represented Miss Lane. Miss Lane was interested in a moiety only of the lessees' interest. The lessors' agents did not communicate with Messrs. Scanlan, who represented the other lessees. The other lessees were a numerous class and widely scattered; some of them resided in Somersetshire; some in the Channel Islands; one in Belgium; others in France, South America, and Australia.

Nothing more was done in the matter until the negotiations were re-opened by a letter dated February 4th, 1903, from Messrs. Thornhill to Mr. Dudley, in which they asked him to instruct his solicitors to send them a short statement of title to the lessors' interest. They referred to the former correspondence in reference to taking out a fee-farm grant, and said they thought they would shortly be in a position to deal with it, and they added:—"Two of the lives in the renewal of 1840 are still in being." Mr. Dudley, in reply, referred Messrs. Thornhill & Son to Messrs. O'Connor & Dudley, and on 6th March, 1903, a correspondence began between the two firms of solicitors as to the titles of their respective clients. Messrs. O'Connor & Dudley asked for and received a statement of the lessees' title and furnished an abstract of the lessors' title.

Messrs. Thornhill & Son delivered requisitions on title, which were answered by Messrs. O'Connor & Dudley; and on the 27th May, 1904, Messrs. Thornhill & Son sent to Messrs. O'Connor & Dudley draft fee-farm grant for approval. During 1903 Messrs. Thornhill's client, Miss Lane, purchased the shares of some of the other persons entitled to part of the lessees' interest in the estate. Subsequently the correspondence dealt with the form of the grant, and on the 16th September, 1904, Messrs. O'Connor & Dudley returned the draft approved of. Miss Lane, for the purpose of simplifying the title, and on the faith of these negotiations, bought for £200, in April, 1903, the shares of persons residing in Somersetshire, Jersey, and South America. In July, 1903, she bought for £600 other portions of the property belonging to persons resident in France. On the 29th June, 1903, the landlords were informed that dealings with the numerous undivided shares were being carried out in order to facilitate the completion of the fee-farm grant. When the title was sent to the landlords' solicitors, these purchases by Miss Lane of other shares of the property pending negotiations were brought to the notice of the landlords.

After the lessors had approved of the fee-farm grant in September, 1904, they made a requisition on behalf of the lessors which made it necessary, in order to have the deed executed, to obtain powers of attorney from two of the persons entitled to part of the lessees' interest. These were Miss Cullen, residing in Belgium, and Mr. Edward O'Donnell, who was in Australia. Messrs. O'Connor & Dudley required that the names of the donees of the powers should be substituted for those of their principals. Great delay occurred in obtaining a power of attorney from Mr. Edward O'Donnell, who was in New South Wales. He was a person of wandering habits, with no fixed address; letters were addressed to him to various post-offices; on one occasion he had not been heard of for two years. His solicitor, named Potts, resided at a place called Narrabri. The nearest notary resided 150 miles from Narrabri. Messrs. Thornhill did not represent Mr. O'Donnell, but on the 11th August, 1904, a power of attorney was sent out to him by Messrs. Scanlan & Son. Mr. O'Donnell refused to execute this without advice, and his solicitor in New South Wales, Mr. Potts, wrote on the 20th September to Messrs.

Barton, J. 1906.

Ex parte LANE.

Horgan & Son, solicitors, Cork, for information about the matter. Messrs. Horgan & Son replied on the 8th November, 1904, but no answer was received. The second life in the lease died on the 12th August, 1905; and after hearing of this, Messrs. Thornhill & Son wrote on the 16th August, 1905, to Messrs. Horgan complaining of the delay. On the 21st August, Messrs Horgan wrote to Mr. Potts. No answer was received; and on the 29th November, 1905, Messrs. Scanlan & Son wrote to Mr. O'Donnell, whose address was not known, "c/o Bank of Australia," and as a result Mr. Potts, on the 22nd January, 1906, wrote to Mr. Horgan enclosing the power of attorney, which reached him on the 7th March, 1906. Messrs. Thornhill & Son then requested Mr. Horgan to have the power of attorney stamped and lodged in the High Court in accordance with the provisions of this Conveyancing Act. This, however, was not done until the 16th April, 1906, and the attested copy was not received by Messrs. Thornhill & Son until the 17th May, 1906. On the 17th January, 1905, Messrs. O'Connor & Dudley wrote to Messrs. Thornhill & Son reminding them that so far back as the 16th September, 1904, they had returned the fee-farm grant approved of, and on the 12th September, 1905 (after the dropping of the second life), they wrote:—"Referring to previous correspondence, we are now instructed to point out to you and to place on record (*a*) that the last life in the lease has dropped; (*b*) that for years past the agent of this estate has again and again called upon your clients to take out the fee-farm grant, which they have neglected to do. Of course they must now bear the consequence of such neglect." Messrs. O'Connor & Dudley were mistaken in supposing that the last life had dropped. On the 13th September, 1905, Messrs. Thornhill & Son wrote stating that the delay was due to Mr. Edward O'Donnell, and pointing out that Messrs. O'Connor & Dudley were mistaken as to the fact of the death of the last life, and that the last life was still in existence. Messrs, O'Connor & Dudley did not then further press the matter. After receiving Mr. O'Donnell's power of attorney, Messrs. Thornhill and Son, on the 19th May, 1906, wrote to Messrs. O'Connor & Dudley stating so, and that everything was then in order in reference to the grant. The last life had, however, died on the 5th May, 1906, and Messrs. O'Connor & Dudley, in their

reply, dated the 23rd May, 1906, wrote :—"Our clients have again and again for several years past called upon yours to take out a fee-farm grant of the lands in question, which they have failed and neglected to do. . . . Your clients have, of course, under the circumstances, forfeited all right to a renewal of the lease, and consequently are not entitled to have a fee-farm grant executed to them pursuant to the Renewable Leasehold Conversion Act. We, therefore, hereby give you notice that your clients' right to require any such grant is disputed on the grounds above indicated.

The petitioners then filed this petition.

Conner, K.C., and *Mountifort G. Longfield* (with them *Ronan, K.C.*), for the petitioners.

There was no specific and unambiguous demand made for fines. Any demand which was made was for a renewal, and a demand for renewal was never held to be a demand for fines such as was required under the Tenantry Act (19 & 20 Geo. 3, c. 30, Ir.). In all cases where a renewal was refused the Courts referred to some ill-conduct, or some gross neglect, on the part of the lessees, such as did not exist here. The circumstances of the lessees must be considered for the purpose of seeing if the delay was contumacious or not. Mr. Thornhill represented a person who was entitled only to about a moiety of the lessees' interest; and the other persons entitled were scattered all over the world, and it was difficult to ascertain their title. But if it could be held that the demand was sufficient in point of form, it was not made on behalf of the proper person. Mrs. Smyth, though in receipt of the rents, had no interest in the estate save her right to a jointure, and the demands up to 1895 were made on her behalf. Nor were the demands made at any time from the proper person, inasmuch as Miss Lane, whom alone Mr. Thornhill represented, could not properly be treated as answering the description in the Tenantry Act of "tenants or their assigns." But if it could be held that there was a proper demand made by and from the proper person, there was in the negotiations as to title, and as to the form of the fee-farm grant in 1903 and 1904, a waiver by the lessors of such demand, and apart from waiver it was clear, considering the positions of the

Barton, J. 1906. *Ex parte* LANE.

parties, and the difficulties in the way, that the demand had been complied with within a reasonable time. The difficulty which existed in this case of discovering the persons who represented "the tenant, or the assignee of such tenant," could have been overcome by the landlord availing of section 2 of the Act, making his demand on the lands from the principal occupier, and inserting a notice of such demand in the *London* and *Dublin Gazettes*: *Ex parte Peyton* (1); *Butler* v. *Portarlington* (2); Furlong, Landlord and Tenant, vol. i., pp. 273, 274; *John* v. *Armstrong* (3); *Dyott* v. *Massereene and Ferrard* (4); *Townley* v. *Bond* (5); *Barrett* v. *Burke* (6); *Jackson* v. *Saunders* (7); *Lord Mountnorris* v. *White* (8); *Bond* v. *Slator* (9).

Chaytor, K.C., and *Poole*, for the respondents:—

A lessor was not obliged to execute a grant, if the right of renewal was lost at law or in equity: s. 1 of Renewable Leasehold Conversion Act, 1849 (12 & 13 Vict. c. 105). Here the right was lost because the tenant had neglected, after demand, to pay fines within a reasonable time: Tenantry Act (19 & 20 Geo. 3, c. 30, Ir.). The correspondence between 1891 and 1906 contained numerous demands, in particular the letters containing references to payment of fines. Even such a reference was not necessary: Lyne on Leases for Lives, pp. 180–1; *Jackson* v. *Saunders* (7). All that was required was that the tenant should be required to renew. A demand to take out a fee-farm grant was a sufficient demand, as it involved the payment of fines. Such a demand was contained in the correspondence. The demand was made by the proper person. Messrs. O'Connor & Dudley had authority from and purported to act on behalf of the lessors. The demand was made to the proper parties. Messrs. Thornhill, solicitors, purported to act on behalf of the lessees, and the latter having adopted the acts of Messrs. Thornhill, as shown by affidavits in support of the petition, are now estopped from disputing the authority of the Messrs.

(1) 21 L. R. Ir. 371.
(2) 1 Dru. & W. 20.
(3) Ll. & G. *temp.* Plunk. 392–405.
(4) I. R. 9 Eq. 149.
(5) 4 Dr. & W. 240.
(6) 5 Dow's Rep. 1.
(7) 1 Sch. & Lef. 443.
(8) 2 Dow's Rep. 459.
(9) 10 Ir. Ch. R. 472.

Thornhill to act on their behalf: *Butler* v. *Portarlington* (1); *Cullen* v. *Leonard* (2). There was gross neglect on the tenants' part to pay the fines—at any rate such neglect as disentitled them to relief. For over fifteen years the landlord was pressing the tenants to take out the fee-farm grant, and warning them of the consequences. Three months' delay had been held sufficient to disentitle a tenant to relief: *Fitzsimons* v. *Burton* (3). Neglect after it went beyond a reasonable time ceased to be mere neglect and became wilful: *Barrett* v. *Burke* (4); Lyne, p. 179. There has been no waiver by the landlords. Indulgence was not waiver: *Jackson* v. *Saunders* (5). Subsequent demands were not necessarily waivers of prior demands, but if complied with they might so operate: Lyne, p. 183.

The Tenantry Act was to be construed most strictly as to the tenant, and most liberally as to the landlord: Finlay on Renewals, p. 310.

[The following additional cases were cited:—*Mountnorris* v. *White* (6); *Wood* v. *Knox* (7); *Keating* v. *Sparrow* (8); *Long* v. *Long* (9); *Galbraith* v. *Cooper* (10); *Boylan* v. *Warner* (11); *Shenton* v. *Corbally* (12); *Sheehy* v. *Bradshaw* (13); *Dyott* v. *Massareene* (14); *Watkins* v. *Lloyd* (15); *John* v. *Armstrong* (16)].

Barton, J.:—

Dec. 5.

This is a petition under the Renewable Leasehold Conversion Act, which provides in sect. 1 that no owner shall be obliged to execute a grant, when the right to renewal is lost both at law and in equity. It has not been seriously disputed that the lessees' right to renewal was lost at law. Therefore, I have not had to consider, and must not be taken as expressing an opinion upon that subject. The arguments have been concerned with the ques-

(1) 1 Dr. & War. 20.
(2) 5 Ir. Eq. R. 134.
(3) Finlay on Renewals, 284.
(4) 5 Dow, 1.
(5) 1 Sch. & Lef. 443.
(6) 2 Dow, 459.
(7) 3 Ir. Ch. R. 109, at p. 119.
(8) 1 Ball & B. 367.
(9) 5 Ves. 445.
(10) 8 H. L. Cas. 315.
(11) Hay. & Jon. 79.
(12) 1 Hog. 403.
(13) 6 Ir. Eq. R. 397.
(14) I. R. 9 Eq. 149.
(15) Hay. & Jon. 832.
(16) Ll. & G. *temp.* Plunk. 392.

Barton, J. 1906.

Ex parte LANE.

tion whether the right to renewal was lost in equity. I have been greatly assisted in this case by the careful analysis of the facts and of the correspondence which Mr. Chaytor presented in the course of his able argument ; and propose to follow his arrangement of the subject.

In the first place I am of opinion that, unless there was an effective demand under the Tenantry Act, the petitioners have not lost their right to renewal by mere delay. The lease contained a *nomine poenae* clause providing for a penalty of 6*d.* per month in the event of the lessees' neglect or refusal to pay fines within twelve months of the dropping of a life. That did not, if the lessor demanded the fines, give the lessee an option to put off paying them until the end of the lease ; at all events equity would not enforce the covenant in that sense : *per* Lord Eldon in *Jackson* v. *Saunders* (1). But if no "demand" were made, it might avail to cover a case of mere neglect : Sugden's Law of Property, p. 560. But quite apart from the effect of the *nomine poenae* clause, there was, in this case, no fraud or misconduct or neglect amounting to refusal. Messrs. Thornhill were *bona fide* under the impression that the lessees had the option, and that there was no urgency about paying fines so long as the lives continued. They were encouraged in that mistaken belief by some of the letters from the lessors' agents. They never supposed that they were risking forfeiture. There may have been delay ; but they acted with candour and *bona fides*. In this respect the case differs from cases like *Jackson* v. *Saunders* (1), *Mountnorris* v. *White* (2), and *Butler* v. *Portarlington* (3), in which there were circumstances approaching to fraud, or refusal or misconduct, which are absent from the present case. Unless there was an effective "demand" within the Tenantry Act, I do not think there was that wilful or fraudulent delay which *per se* would deprive the lessees of their right of renewal.

Mr. Chaytor relied upon several letters, written between 1891 and 1901, as "demands" within the Tenantry Act. I assume that all or some of them were in form sufficient "demands." All that is required in a "demand" is that it should be unambiguous ;

(1) 2 Dow, 444, 450, 452. (2) 2 Dow, 459. (3) 1 Dr. & War. 20.

and that, as Pennefather, B., said in *Watkins* v. *Lloyd* (1), it should give fair notice that the landlord is looking for his fines, or, as Lord St. Leonards said in *Butler* v. *Portarlington* (2), fair notice that it is necessary that the tenant should renew. Once fair notice of that kind is given, mere neglect becomes gross laches. But were these demands made by the right person to the right person? Down to the death of Mrs. Smyth in 1895 they were made on her behalf. Her only interest in the property was as jointress. A demand should be made by or on behalf of "the landlords or lessors or persons entitled to receive such fines." She hardly answered to that description. It is true that after the death of Mrs. Smyth in 1895, the subsequent letters were written on behalf of the lessors. But were they addressed to the right parties, *i.e.*, "to the tenants or their assigns"? They were addressed to Messrs. Thornhill, the agents for Miss Lane, who was only entitled to a moiety of the premises. Messrs. Thornhill, in several letters, informed the lessors that they did not represent the other parties, whose agents in Ireland were Messrs. Scanlan & Sons. The lessors did not communicate with Messrs. Scanlan. In *Butler* v. *Portarlington* (2) there were two agents representing different lessees; and the lessor was in communication with them both. Messrs. Thornhill could not have communicated a "demand" to Messrs. Scanlan, because they supposed that the lessees were protected by the *nomine poenae* clause, and they never understood that the letters which they were receiving from the lessors embodied "demands" within the Tenantry Act. The lessors might have made a demand to Messrs. Scanlan, or might have availed themselves of sect. 2 of the Tenantry Act. When a lessor has a difficulty in ascertaining the tenants or his assigns, sect. 2 of the Tenantry Act enables him to make the demand by service on the principal occupiers, and by insertion of notices in the *Gazettes*. That course was pursued in *Barrett* v. *Burke* (3), and was held to have been the course which ought to have been taken in *John* v. *Armstrong* (4) and *Smith* v. *Shannon* (5). In this case the difficulty of tracing the tenants and their assigns was greater than in any of those cases. Here the "tenants and their

(1) Hay. & Jon. 332, 344.
(2) 1 Dr. &. War. 20.
(3) 5 Dow. 1.
(4) Ll. & G. *temp.* Plunk. 392-405.
(5) 3 Ir. Eq. R. 452, 468.

Barton, J. 1906. *Ex parte* LANE.

assigns" were scattered over the world—some in Somersetshire, some in the Channel Islands, one in Belgium, others in France, Buenos Ayres, and Australia. I entertain grave doubts whether any of those letters between 1891 and 1901 were written by and to the proper parties, so as to constitute effective "demands" within the meaning of the Tenantry Act.

But it is not necessary to rest the decision of this case upon any infirmity in the letters prior to 1901, because, even if they were effective "demands," they were, in my opinion, waived by what occurred in 1903 and 1904. I agree with Mr. Chaytor that a new "demand" does not waive a prior one, unless complied with within a reasonable time; also that a landlord's indulgence or courtesy should not be turned against him; also that previous delay is not to be left out of account in considering the effect of subsequent delay. But a lessor can waive the effect of a "demand" by pursuing a course of conduct inconsistent with further insistence upon it, especially after he has become aware that his course of conduct is being acted on by the other party to his detriment. In 1903 negotiations were re-opened for a fee-farm grant; and Messrs. Thornhill, at the lessors' request, incurred trouble and expense in making inquiries, collecting title-deeds, and making every preparation for the completion of the grant. But that was not all. Miss Lane, on the faith of the negotiations, and with a view to completing the grant, purchased undivided shares of some of the other scattered owners of the lease, thus simplifying the title and removing obstacles to completion. In April, 1903, she bought for £200 shares of persons residing in Somersetshire, Jersey, and South America. In July, 1903, she bought for £600 shares belonging to persons residing in France. The lessors were informed that dealings with undivided shares of the lessees' interest were being carried out with a view to completing the grant (*e.g.*, see letter of June 29th, 1903). These purchases by Miss Lane of other shares for the substantial sum of £800 were afterwards brought definitely to the lessors' knowledge when the title was sent, with the result that the fee-farm grant was approved by them on September 16th, 1904. Under these circumstances, I think, the lessors must be held to have waived the demands, if

any, which may have been contained in the correspondence which closed in 1901.

This brings me to the final stage of the case. Was there such delay after September, 1904, as to disentitle the petitioner to renewal? The fee-farm grant had then been approved by the lessors. All fines had been ascertained, and the petitioners, as the lessors well knew, were thenceforward always ready and willing to pay them. Nothing remained to be done except to tender the fee-farm grant for execution; and it would have been tendered for execution, and would have been executed, if the grantor had not at the last moment made a reasonable, but very onerous, requisition necessitating the obtaining of powers of attorney from a Miss Cullen, residing in Belgium, and from a Mr. Edward O'Donnell, a backwoodsman in Australia. The subsequent delay flowed from this requisition, which was not capable of being quickly complied with. The power of attorney from Belgium was obtained in November. But to get a power of attorney from O'Donnell, in Australia, was no easy matter. He was a person of wandering habits, without any fixed address. Letters had to be addressed to him to various post-offices on the chance of catching him. At one time no news had been received of him for a period of two years. But this was not the only difficulty in the way of getting a power of attorney executed by him. His solicitor was a Mr. Potts, residing at a place called Narrabri, in New South Wales. It does not appear to have been a place in the centre of civilization; because the nearest notary lived 150 miles away. Accordingly, in order to comply with the grantor's requisition, Thornhill, who was not in communication with O'Donnell, had to communicate with Messrs. Horgan, solicitors, of Cork; Messrs. Horgan had to communicate with Potts, of Narrabri; Potts had to find his client, the wandering backwoodsman; and, having found him, he had to bring him into touch with the notary who resided 150 miles away. The burden of complaint is that in the year 1905 six months passed away, during which Thornhill did not sufficiently stir up Messrs. Horgan to cable to Potts, to catch O'Donnell, so as to get the power of attorney executed with the assistance of the notary. It may be that Messrs. Thornhill should have written to Horgan again during that time.

Barton, J. 1906. Ex parte LANE.

But they assumed that others were doing their duty, and they should not be held responsible for all the misunderstandings and mishaps which occurred at the Antipodes in complying with the grantors' rather onerous requisition. I may refer to *Trant* v. *Dwyer* (1), in which Lord Lyndhurst confirmed an Irish decree of renewal where there had been three years' delay after demand. But there were negotiations going on, and it was clear that the lessors knew that the tenant was always ready to pay the fines.

In one respect, however, this is a stronger case for the petitioners than cases like *Trant* v. *Dwyer* (1), because I do not think that any effective demand was in operation during this period. The respondent relies on the letters of 17th January and 12th September, 1905. The former was a letter dealing with matters connected with the landlord's title, and contained the following words:—"We would remind you that so far back as the 16th September last we returned the fee-farm grant approved of." I cannot regard that as a "demand," and I do not think it was intended or understood as such. It was an ordinary reminder in the course of negotiations. There remains the letter of 12th September, 1905, in which the lessors' solicitors wrote that they were instructed to place on record that the last life in the lease had dropped, and that the lessees must now bear the consequence of their long neglect. That letter contained a clear and specific "demand"; but it was grounded on the allegation that the last life had dropped, which was a mistake of fact. Messrs. Thornhill at once corrected the mistake, and gave information as to the steps they were taking to get the power of attorney from Australia. The lessors' solicitor accepted the correction, and did not then press the matter further. In view of these circumstances, I cannot regard the letter of 12th September, 1905, as having been an effective and unambiguous "demand" capable of converting subsequent delay into gross laches. As to the materiality of a mistake or misunderstanding in a matter of the kind I may refer to *Deane* v. *Marquis of Waterford* (2) and *Baldwin* v. *Bridges* (3). From September, 1904, the lessors were well aware that the lessees were at all times ready and willing to pay the fines which had

(1) 1 Dow & Clark, 125. (2) 1 Sch. & Lef. 451, 454 n.
(3) Ll. & G. *temp.* Plunk. 408, 415.

been ascertained between them for that purpose. I hold, therefore, that after the commencement of these negotiations in 1903 there was no effective and unambiguous demand within the Tenantry Act; and that the delay in the course of these negotiations, and in complying with the grantor's requisition, was not of a kind to deprive the petitioners of their right of renewal.

Barton, J.
1906.
Ex parte LANE.

For all these reasons I am of opinion that the petitioners are entitled to have the prayer of their petition granted. But, under the circumstances, I think it is a case in which the petitioners must pay all the costs of the petition.

Solicitors for the petitioners: *Thornhill & Son.*
Solicitors for the respondents: *O'Connor & Dudley.*

W. M'G.

RUSSELL *v.* CROWLEY AND ANOTHER.

M. R.
1906.
Oct. 26, 27.
Appeal.
1907.
Jan. 22.

Breach of trust—Legacy—Statute of Limitations—Real Property Limitation Act, 1874, *s.* 8—*Accruer of right—Life interest—Payment of capitalised sum to life tenant—Acceleration of interest in remainder.*

W. L., who was possessed of, amongst other property, certain shares in the Munster Bank, then a flourishing institution, died in 1867, leaving a widow and three children, including the plaintiff. By his will he bequeathed to his three children, who were then minors, all his real and personal property in equal shares, and directed that his wife should get, for her support, one fourth part of the rents of houses, of dividends of the said Munster Bank shares, and of the Kinsale Gas Company, Limited, and of the interest of any money he might be possessed of. J. H., the sole executor, proved the will, and died in 1873, and the administration of the estate was undertaken by one of his executors, T. C. In 1870 and 1873, respectively, J. H. and T. C., in breach of trust, but in good faith, applied portion of the testator's assets in the purchase of further shares in the Munster Bank, which subsequently failed, and T. C. was compelled to pay a call of £190 in respect of the purchased shares, the value of which was lost. In 1885 an arrangement was entered into between the widow and the three children, with a view to dividing the then subsisting assets between them, and transfers of the bank shares were prepared and signed, but not registered, the arrangement being postponed owing to a direction in testator's will, that the rights of J. A. L., one of the children, should not accrue in possession until he attained the age of twenty-five, which occurred in 1890. In 1890 it was arranged between the

M. R. 1906.

RUSSELL v. CROWLEY.

widow and the three children that the estate should be wound up. The widow's life interest in the testator's assets was valued at £50, which was paid to her as a capital sum, and the balance of the assets was distributed between the three children, each of whom gave a receipt therefor, and released the executor from all claims in connexion with the estate. None of the children had then, as they alleged, any knowledge of the unauthorized investments in the Munster Bank shares. The widow died in 1904, and T. C. in 1905. The present action was instituted in 1905, to administer the real and personal estate of W. L., and sought to charge the defendants, as executors of T. C. (who admitted assets), with the price of the shares which had been purchased in breach of trust, and the amount of the calls thereon:—

Held, by the Court of Appeal, reversing the judgment of the Master of the Rolls, that, on the true construction of the arrangement entered into in 1890, the widow's life interest was determined, and the title of the plaintiff and of the remaining children to the entire assets accelerated; that there was from that date a present right of action in respect of the entire assets, including the one-fourth part thereof bequeathed to the testator's widow for her life, and therefore the action was barred by the Statute of Limitations.

By his will, William Lester, of Kinsale, county Cork, gave all his property to his three children, Rebecca Sophia (Mrs. Skuse), the plaintiff Jane (Mrs. Russell), and Jacob Augustus, but not to enter into possession of the property until they were all of age, and Jacob Augustus was not to be considered of age until he reached twenty-five years; and the testator directed that his wife for her support should get one-fourth part of the rents of houses, of dividends of shares in the Munster Bank, Limited, and the Kinsale Gas Company, Limited, and of the interest of any money he might be possessed of. William Lester died 11th December, 1867, and probate of his will was granted to his executor, Joseph Horsford, on February 1st, 1868. Joseph Horsford died in 1873, and his will was proved by his executors, Thomas Crowley and another. Thomas Crowley survived the other executor, and died on 22nd February, 1905, and his will was proved by his executors, the defendants in the action.

His widow and his three children—the plaintiff, Jane Russell, Rebecca Sophia Skuse, and Jacob Augustus Lester—survived William Lester.

William Lester, at the time of his death, was the owner of certain house property, and also ninety shares in the Munster Bank, and some shares in the Kinsale Gas Company. He also

had shares in the brigs "Jane" (which was lost at sea) and "T. S. Reeves" and certain other moneys of a small amount.

The statement of claim alleged breach of trust as regards Joseph Horsford, in that he invested on 30th July, 1870, £62 17*s.* 1*d.* of the assets in the purchase of another share in the brig "T. S. Reeves," alleged not to be accounted for, and that on 23rd August, 1870, he bought forty-five shares in the Munster Bank for £225; and as regards Thomas Crowley, that he bought forty-five more of these shares in 1873 for £292 10*s.*, and in 1880, thirteen more for £78. Those were shares offered by the bank in respect of the original holding of the ninety; and in 1886, Thomas Crowley, after the failure of the bank, was obliged to pay a call of £190, in respect of the purchased shares.

The plaintiff, Jane Russell, attained age in 1883; Rebecca Sophia Skuse in 1881, and Jacob Augustus Lester attained twenty-five in 1890.

In 1885, the beneficiaries under William Lester's will desired to divide the then subsisting assets; and transfers of the bank shares were prepared and signed by the parties, not including the plaintiff. The transfers were not registered and were not acted on, as the rights of Jacob Augustus were found not to accrue in possession till he attained twenty-five.

The Munster Bank went into liquidation soon afterwards.

In 1890, the remaining assets, viz.:—the proceeds of the house property which had been sold and the Gas shares, were distributed. It was first proposed to divide the proceeds of the sale of the house property in a way which was not ultimately carried out. This proposed arrangement was contained in a document dated November, 1890, which was as follows:—"We, the undersigned, being the interested parties mentioned in the will of the late William Lester, jointly and severally desire that the proceeds of the late sale of the house property, forming part of the estate mentioned, be divided into four equal parts, after deducting all legal expenses and duty due Government; and one-fourth be paid over to each of the undersigned, viz.:—One-fourth to Mrs. William Lester; one-fourth to Mr. J. A. Lester; one-fourth to Mrs. J. Russell; one-fourth to Mrs. S. Skuse." The letter was signed by all the beneficiaries except Mrs. Skuse.

M. R. 1906.

RUSSELL v. CROWLEY.

The arrangement ultimately carried out as regards the proceeds of the house property was that a sum of £30 was retained to meet succession duty, the life estate of the mother was valued at £50, and this was paid to her as a capital sum, and the balance was divided amongst the plaintiff and the two other children in sums of £94 8*s.* 10*d.* each; and under the same arrangement the Gas shares were on 5th December, 1890, transferred to the three children, including the plaintiff, and receipts in the following terms were signed by the plaintiff and her sister, and brother:—"Received from Mr. T. Crowley the sum of £94 8*s.* 10*d.* sterling, being my proportion of the amount realized by the sale of Kinsale houses, which had been the property of my late father, Mr. William Lester, and of all claims in connexion with said property, as per statement at foot hereof." The mother also signed a receipt for the sum of £50. All the parties wrote a letter of thanks to Mr. Crowley for his efficient management, and presented him with a handsome testimonial of their regard.

Accurate accounts were kept, and the accounts and documents connected with the management of the assets since the death of Mr. Lester were furnished to Jacob Augustus Lester by the defendants after the death of Thomas Crowley; and the statement of defence alleged that the contents and effect of these accounts were communicated to the plaintiff and her solicitor by Jacob Augustus Lester before action. The widow, Mrs. Lester, died in 1904, and after her death the plaintiff brought this action against the defendants as executors of the original executor of the testator, William Lester, claiming administration of the real and personal estate, and that accounts and inquiries on the footing of wilful default might be ordered in respect of the matters previously stated, and interest on the sums that on taking the accounts might be found due.

The plaintiff, in her evidence, stated that she did not know that any of the Munster Bank shares had been bought after the testator's death.

T. F. Molony, K.C., *M'Gonigal*, and *W. J. Johnston*, for the plaintiff.

P. D. Fleming, K.C., and *A. M. Sullivan*, for the defendants.

The arguments in the Rolls Court were substantially the same as reported in the Court of Appeal, *infra*, p. 282.

M. R. 1906. RUSSELL v. CROWLEY. Oct. 27.

THE MASTER OF THE ROLLS:—

The case is a hard one. It is not often that letters, such as the letter dated November, 1890, and the letter dated 31st January, 1891, are followed up after the lapse of fifteen or sixteen years by Chancery proceedings. The misfortune of the defendants, or those whom the defendants represent, was that while they kept with scrupulous care and accuracy books which set forth in the fullest and minutest detail every transaction connected with the assets of the testator, they never, in fact, rendered an account to the beneficiaries under the will of the testator, capable of being checked, examined, and balanced, until after the death of the testator's widow, which event occurred on the 4th of December, 1904. I entertain little doubt that if Thomas Crowley had in the year 1890, when the parties were desirous of making a distribution of the assets, rendered an account showing that shares in the Munster Bank had been purchased after the death of the testator, if the circumstances under which they had been purchased had been explained to the plaintiff and her brother and sister, and if it had been further explained that the executor Joseph Horsford, and his executor Thomas Crowley, had incurred liability in reference to a transaction entered into in the *bona fide* belief that it was for the benefit and advantage of the family, the plaintiff and her brother and sister would have added to their expressions and tokens of gratitude an indemnity to Mr. Crowley in respect of any loss arising from the purchase of the Munster Bank shares. But, having listened to the evidence of the plaintiff and her brother, and having read every document in the case, I entertain no doubt that when the arrangement of 1890 was arrived at not one of the beneficiaries under the will of the testator was made aware of the fact that among the "Munster Bank shares" were shares which were not the property of the testator in his lifetime, but shares which were purchased after his death by his executors out of his assets.

The evidence of the plaintiff and her brother is that until the books were furnished to them after the death of their mother they knew nothing of the purchase by the executors of those shares, and knew nothing of the purchase of the small interest in the brig "T. S. Reeves."

M. R. 1906.

RUSSELL v. CROWLEY.

The defence of laches and acquiescence relied on in the statement of defence has not been sustained, and could not be sustained. The statement of defence alleges that "in the year 1890, the said Jacob Augustus having attained the age of twenty-five years, and all the beneficiaries under the said will being then of full age and thoroughly cognizant of the state of the assets and the dealings therewith, the plaintiff, her mother Susan, her brother Jacob Augustus, and her sister Rebecca Sophia Skuse, all signed and forwarded to the said Thomas Crowley a document in the following form: 'We, the undersigned, being the interested parties mentioned in the will of the late William Lester, jointly and severally desire that the proceeds of the late sale of the house property forming part of the estate mentioned be divided into four equal parts after deducting all legal expenses and duty due Government, and one-fourth be paid over to each of the undersigned, viz.:—One-fourth to Mrs. William Lester; one-fourth to Mr. J. A. Lester; one-fourth to Mrs. J. Russell; one-fourth to Mrs. S. Skuse.'"

The pleader was well aware that the foundation of a defence of laches or acquiescence is knowledge of facts; and there was no knowledge of facts in this case.

As regards the defence of the Statute of Limitations, I am of opinion that the defendants are entitled to succeed to a very large extent.

The authorities cited by Mr. Fleming are clear in principle. They are collected and reviewed in *Mackay* v. *Gould* (1). Of course every case of this description ultimately depends on the facts and circumstances of the particular case. But, having regard to authority, I hold that neither the original executor in this case, nor his executor, became, or was, an express trustee of the property the subject matter of the present action. As was held in *Mackay* v. *Gould* (1), so I hold that this is an action brought to recover a legacy within section 8 of the Act of 1874, and I hold that the claim would have been statute-barred in its entirety, had it not been for the following provision in the will of William Lester:—"I direct that my wife for her support gets one-fourth part of the

(1) [1906] 1 Ch. 25.

rents of houses, dividends of shares in the Munster Bank, Limited, and the Kinsale Gas Company, Limited, and interest of any money I may be possessed of."

The meaning of the words "any money I may be possessed of" was not discussed before me yesterday. Indeed, I was left under the impression, and I still so remain, that it was not contested by the defendants that the funds alleged to have been wrongly invested were within the meaning of the words "money I may be possessed of," and that the testator's widow was entitled to receive one-fourth of the interest of same. I can, if necessary, direct an account and inquiry to ascertain whether the funds invested by Joseph Horsford and Thomas Crowley in the brig "T. S. Reeves," and in the purchase of Munster Bank shares, and in payment of the calls on those shares, came as a matter of fact within the description in the will of "any money I may be possessed of," but unless I am specially asked to do this I must deal with the case on the basis upon which it was argued.

I hold that Mrs. Lester did not by laches, or acquiescence, or by actual release in 1890, forfeit her rights under the will in respect of the moneys which were improperly invested. The documents, when carefully examined, do not justify the suggestion that Mrs. Lester knew all, or, indeed, anything, about the dealings in reference to these shares, and knowingly released her rights in reference to them. But whether she did or did not, it appears to me clear that until her death in 1904 "a present right" to receive the legacy of the plaintiff (to the extent of one-fourth of such moneys) did not accrue and had not accrued.

I consider that the receipts of the 5th December, 1890, were confined to dealing with proceeds of house property. The letter of November, 1890, is wider in scope, but it was only signed by three of the beneficiaries, and the arrangement fell through, and Mr. Skuse, the solicitor, acting for Mrs. Skuse, his stepmother, advised her and Mr. Crowley that the proposed arrangement was one which Crowley, as executor, should not assent to. The arrangement ultimately carried out was, that there should be a division of the proceeds of the sale of the house property on a different basis and a transfer of the Gas shares to and among the beneficiaries.

I hold for these reasons that to the extent of one-fourth of the

M. R. 1906.

RUSSELL v. CROWLEY.

money invested in the purchase of the shares in the brig "T. S. Reeves," and one-fourth of the fund invested in Munster Bank shares subsequent to the death of the testator, and of the calls on those shares, the plaintiff is entitled to succeed. Interest can only run as from the death of Mrs. Lester, which (as already stated) occurred on the 4th December, 1904.

There are two other sums payable by the defendants, viz., the sum of £30 retained for succession duty, and the sum of £13 14*s.* 5*d.* (which, by some misunderstanding, was not accounted for).

There does not appear to me to be any necessity to order general administration of the estate, and (the defendants admitting assets) I propose to make a decree ascertaining the figures and directing payment into Court of the sum so ascertained.

If the defendants do not seek to have the account taken, the amount can be ascertained by consent, and I will order that amount to be paid into Court.

R. W. L.

Appeal. 1907.

Jan. 22.

The defendants appealed (1).

P. D. Fleming, K.C., and *A. M. Sullivan*, for the appellants:—

The testator's will contained no express trust, and this is, in effect, an action to recover a legacy, and is barred by the Statute of Limitations. The true effect of the transaction entered into in 1890, when the testator's children were all of age, was that the widow's life interest became extinguished, and a present right to receive accrued to the plaintiff. The Statute of Limitations began to run in favour of the executor from the completion of that transaction, and, twelve years afterwards, the right of action was barred: *Mackay* v. *Gould* (2). We also rely on laches and acquiescence on the part of the plaintiff: *Atkinson* v. *Lord* (3).

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

(2) [1906] 1 Ch. 25.

(3) 81 L. T. R. 812.

Molony, K.C., *M'Gonigal*, and *W. J. Johnston*, for the respondent :—

We admit that the suit cannot succeed as to three-fourths of the assets, but the Statute of Limitations has no application to the plaintiff's claim in respect of the balance. A *cestui que* trust, who is a remainderman, or who is under disability, is entitled to the full statutory period from the accruer of his right in possession, or from the cesser of the disability. Here, as to one-fourth of the assets, there was no present right to receive until the death of the testator's widow in 1904.

The defendants cannot rely on laches or acquiescence, as the plaintiff knew nothing in 1890 of the breaches of trust in respect of the unauthorized purchases of shares: *Gandy* v. *Macaulay* (1).

SIR SAMUEL WALKER, C. :—

This is an appeal from the judgment of the present Master of the Rolls, made in an action to administer the real and personal estate of William Lester, who died on the 11th December, 1867. The Master of the Rolls, on the view which he took of the facts, held that the Statute of Limitations furnished no complete defence to the action, and that the plaintiff was entitled to relief in so far as the claim related to one-fourth of a sum of £56 5*s.* 9*d.*, assets invested in the purchase of a share in the brig "T. S. Reeves," and one-fourth of the sum of £737 10*s.* invested in the purchase of Munster Bank shares, and the calls thereon, and two sums of £30 and £13 14*s.* 5*d.* retained out of assets, with interest on these several sums. This liability was ascertained in figures to be £242 3*s.* 4*d.* : and, the defendants admitting assets to that extent, he ordered them to lodge in Court this sum, with interest from the 4th December, 1904, the date of the death of testator's widow, and he declined to make any order for administration.

The action is brought against the executors of the surviving executor of the original executor of the testator.

William Lester had three children—Jane, the plaintiff, now Jane Russell; Rebecca Sophia, now Mrs. Skuse; and a son, Jacob Augustus—and he left a widow, Susan Lester. By his will he gave

(1) 31 Ch. D. 1.

Appeal. 1907.

RUSSELL *v.* CROWLEY.

Sir Samuel Walker, C.

all his property to his three children, but not to enter into possession till they were of age, and Jacob Augustus not to be considered of age till he was twenty-five; and he directed that his wife, for her support, should get one-fourth part of the rents of houses, of dividends on shares in the Munster Bank, Limited, and in the Kinsale Gas Company, and of the interest of any money he might be possessed of. His executor, Joseph Horsford, proved the will on the 1st February, 1868, and Joseph Horsford died in 1873, and his will was proved by Thomas Crowley and another. Thomas Crowley survived, and died on the 22nd February, 1905, and his will was proved by the defendants.

William Lester, at the time of his death, was the owner of certain house property, and also ninety shares in the Munster Bank, and some shares in the Kinsale Gas Company, and he had a share in the brig "Jane," which was lost at sea, and may be left out of consideration, and certain other moneys to a small amount. The breach of trust alleged in the claim is, as regards Joseph Horsford, that he invested on the 30th July, 1870, £62 17*s.* 1*d.* of the assets in the purchase of a share in the brig "T. S. Reeves," alleged not to be accounted for, and on 23rd August, 1870, bought forty-five shares in the Munster Bank for £225; and as regards Thomas Crowley, that he bought forty-five more of these shares in 1873 for £292 10*s.*, and in 1880 thirteen more for £78. These were shares offered by the bank in respect of the original holding of the ninety, and in 1886, Thomas Crowley, after the failure of the bank, was obliged to pay a call of £190 in respect of the purchased shares.

The plaintiff Jane attained twenty-one in 1883, Rebecca Sophia in 1881, and Jacob Augustus attained twenty-five in 1890.

It appears that in 1885 there was a desire to divide the then subsisting assets amongst the widow and three children, and transfers of the bank shares were prepared and signed by the parties, but not including plaintiff. The transfers were not registered and not acted on, as Jacob Augustus' rights were found not to accrue in possession till he attained twenty-five. The Munster Bank failed immediately afterwards.

In 1890, however, the assets remaining—*i.e.* proceeds of the

house property which was sold and the Gas shares—were distributed. It was first proposed to divide the house property proceeds in a manner not ultimately carried out, and this proposed arrangement is contained in a document of November, 1890. [His Lordship read the document, as given, *ante*, p. 277.] This letter was signed by plaintiff and all the children except Mrs. Skuse. The arrangement, however, ultimately carried out as regards the proceeds of the house property was different. A sum of £30 was retained to meet succession duty, and the life estate of the mother was valued at £50, and this was paid to her as a capital sum, and the balance divided amongst the plaintiff and two other children in sums of £94 8*s.* 10*d.* each; and under the same arrangement the Gas shares were, on the 5th December, 1890, transferred to the three children, including the plaintiff, and receipts were signed by the plaintiff and her sister and brother. [His Lordship read the receipt, as given *ante*, p. 278.]

It will be observed that in November, 1890, for valuable consideration an arrangement was made by which the mother gave up her life interest, and the title of the plaintiff and others to the house property and Gas shares was accelerated, and it was a term that both plaintiff and the mother released all their claims against the testator's estate. The estate dealt with and which was the subject of agreement is what actually then existed in the shape of assets. It did not refer to any proceeds of the brig "T. S. Reeves," which apparently had been applied in the same manner.

It is said by the plaintiff, in her evidence, that she did not know that any Munster Bank shares had been bought after the testator's death. We may doubt this, having regard to the accurate accounts kept; but the mother was allowed to retain what she then got *in præsenti*, and the plaintiff acted on it, and it is not till after the mother's death, in 1904, that this suit is instituted. There is no possibility now of restoring the parties to their original position; and, in my opinion, if the mother's rights are sought to be treated as subsisting in any part of the income till 1904, such rights could have been, and should have been, asserted in 1890, and, therefore, the Statute of Limitations ran as against the plaintiff from 1890, on the principle applied by the Master of the

Appeal. 1907.

RUSSELL v. CROWLEY.

Sir Samuel Walker, C.

Rolls on the view of the facts which he took. All the same grounds apply to the claims in respect of the shares in the brig "T. S. Reeves"; and on the merits it appears they were sold in 1870, and the net proceeds accounted for.

It is only on the facts I differ from the Master of the Rolls.

Within a few days after that division of property we have the letter written by the business man of the family, Jacob Augustus, of 31st January, 1891, to the defendant Crowley, on behalf of himself and his mother and sisters, sending their present as a testimony to the kindness and care with which he managed the estate during their minority.

The £30 and £13 14*s.* 5*d.* are a very small matter. The retention is quite explained, and the defence offers to distribute them. We cannot order them into Court, as we are dismissing the action; but we can, and shall, declare that the executors sued are entitled to deduct their costs *pro tanto* out of these sums.

FITZ GIBBON, L.J.:—

I concur. It appears clear that in 1885 all the members of the family came to an understanding that the estate should be wound up, by taking it out of the hands of the executors, and distributing it among the beneficial owners. The carrying out of that understanding was postponed until Jacob had attained the age of twenty-five in 1890, and in the meantime the circumstances of the estate, as well as the terms of distribution, were somewhat varied.

In my opinion, the important date is that of the completion of the arrangement; and the case turns on the rights of the parties as to bringing actions in respect of the estate, as affected by the arrangement of 1890. Both from the nature of the question now raised, and also from the relations between the parties, I do not think that we can hold that the arrangement of 1890 was conclusively or indisputably binding on the widow; but at the worst it was voidable, or liable to be re-opened, upon an appropriate action or proceeding being taken by her.

No such action or proceeding was ever taken; and, furthermore, she never, down to her death, disclaimed or questioned the

arrangement of 1890 in any way. Whether it would be voidable, or could be re-opened by her, would depend, if she had taken action, on the fact of *her* knowledge, as distinguished from that of the children, of the mode in which the assets had been dealt with, and of her rights in respect of them. I think it most probable that she knew all about the Munster Bank shares which her husband held at his death; and also that she knew all that occurred with respect to the further shares afterwards taken by the executors; if they acted with her concurrence, she could not have set aside the arrangement, or made the executors personally liable, unless she could prove some fraud or concealment, or some other such matter, that has not been suggested before us.

The liability now sought to be enforced arose under peculiar circumstances. The purchase of the Munster Bank shares, which is now sought to be treated as a breach of trust, was not an ordinary investment; except as to five shares, it was rather the acceptance of an offer made by the bank to the existing shareholders, which at the time was a beneficial one, being an offer to issue further shares at a special price in respect of their original holdings. Therefore all that was done—and I assume it to have been contrary to the strict duty of the trustee to do it—was taking advantage of an offer to allow him to put further money on favourable terms into an investment in which the testator had already invested. The children say that they did not assent, and without further investigation, we cannot assume that they did. But on the other hand, we are not to assume that the facts were not known to the mother, and we have to look at the effect which the transaction of 1890 had, at the time, on her right of action, and on the rights of the children.

It seems to me clear that the substance of the transaction was the purchase, out and out, of all the mother's interest in the assets for the fixed sum of £50 plus an assignment of certain other things; in other words, it was a purchase for the benefit of the children of all the rest of the assets as they stood.

The moment that agreement was made in 1890, the benefit of it passed directly to the children, and as a matter of fact they received part of it, because assets which would otherwise have been divisible between the mother and the children, were divided

Appeal. 1907.

RUSSELL v. CROWLEY.

Fitz Gibbon, L.J.

among the children alone, the mother receiving only the agreed price.

Therefore, it appears to me, that at the same moment when the mother was bought out for £50, under an agreement which, though liable to be re-opened by her, she made no attempt to question, the children, and each of them, then and there acquired a present right of action in respect of all the rest of the assets, and therefore the Statute of Limitations began to run against them, for the protection of the executors, from the completion of the transaction of 1890, and twelve years afterwards their right of suit was barred.

Every other claim in the case is thus barred by the Statute of Limitations, with the exception of two small sums of £30 and £13 14*s.*, which were items of trust money which had been segregated. These claims were admitted before action, and an offer was made to pay them over. The defendants are entitled as executors to have their costs of this suit, which is absolutely devoid of merits, paid out of the assets, and our decree will provide that they may set off these two sums *pro tanto* against their costs.

HOLMES, L.J. :—

William Lester died in 1887, having made a will, by which he devised and bequeathed to his three children all his real and personal property, in equal shares, and directed that his wife was to get for her support one fourth part of the rent of houses, dividends of shares in the Munster Bank and the Kinsale Gas Company, and the interest of any money he might be possessed of. It is somewhat ambiguous whether, in the gift to the testator's wife, the limitation of one-fourth part applies to the dividends on the shares and the interest on the money; but it was held that it did by the Master of the Rolls, and I think that he was right in this. This is, however, not material in the view I take of the case.

Mr. Joseph Horsford, the sole executor nominated by the testator, having proved the will, died in 1873, and thereupon the administration of the estate was undertaken by one of his executors, Thomas Crowley. There is no doubt that this gentleman discharged his duty, as the representative of William Lester, with exemplary care, keeping accurate accounts of the assets, and

managing them to the best of his ability in the interest of the persons beneficially entitled, all of whom, except the widow, were minors down to the year 1881, when the plaintiff, the eldest child, came of age.

The testator at the time of his death held ninety shares in the Munster Bank, then regarded as financially very flourishing; and both Mr. Horsford and, after his death, Mr. Crowley applied portion of the assets in purchasing additional Munster Bank shares —I believe ninety-five in all. There is no doubt that these investments, although technically breaches of trust, were made in good faith, and that the high dividends paid thereon for years were duly applied for the benefit of the legatees under the testator's will. His three children were minors when the additional bank shares were thus purchased, and I accept the evidence that they did not know when or how they were acquired. It is possible that they may have supposed that all the shares had belonged to their father in his lifetime; but it is more likely that they did not think of the matter at all, and it is highly improbable that their mother did not know all about it. It is certain that in the year 1885 the children, being then of age, were desirous to have these shares divided amongst the persons entitled thereto, and it is also certain that this would have been then carried out were it not for a provision in the will that one of them, Jacob, should not be considered of age until he reached twenty-five. At the time when this division was contemplated the Munster Bank was falling into financial difficulties, and before the end of the year it was known to be hopelessly insolvent. Mr. Crowley, like the other shareholders, was obliged to pay in discharge of calls a large sum, which, with the consent, apparently, of all parties interested, he subsequently recouped himself out of the assets; and from that time forward the money invested in the bank securities was regarded as lost.

In 1890, it was arranged between the plaintiff, her mother, her brother Jacob, her sister, Mrs. Skuse, and Mr. Crowley to wind up the estate; and for this purpose the houses referred to in the will were sold. It was part of the arrangement that the widow was to be paid a certain part of the purchase-money in satisfaction of her life estate in her husband's property, and she received this

Appeal. 1907.

RUSSELL v. CROWLEY.

Holmes, L.J.

sum, giving a receipt therefor, the terms of which leave no doubt of the nature of the agreement. The rest of the price of the houses, as well as the Kinsale Gas shares, were divided equally amongst the three children; and this was regarded by all parties as a final distribution of the testator's assets, save a sum of £30 retained by Mr. Crowley to meet a possible demand for succession duty, and one house that was unsaleable in consequence of the term for which it was held being about to expire.

Mrs. Lester, the plaintiff, and her brother took the opportunity of this closing of their dealings with Mr. Crowley to express in writing their thanks and obligations for the care, anxiety, and trouble he had taken, and the ability with which he had managed the estate, adding that his management, but for the unlooked-for failure of the Munster Bank (over which he had no control), would have been very successful. That this was the genuine feeling of the writers was evidenced by the fact that the document was accompanied or followed by a valuable present given to Mr. Crowley as a testimony to his services. Mrs. Lester died in December, 1904, and Mr. Crowley in the following February. In the interval between these deaths, Jacob Lester applied for an inspection of the books of account kept by the executor; and he says he then discovered for the first time that about half the bank shares were purchased by the executors. The principal object of the present action, begun in May, 1905, is to charge Mr. Crowley's executors with the price of these shares, and the sums paid for calls thereon; and its result depends, in my opinion, upon whether my view of the transaction of 1890 is correct.

The Master of the Rolls held that as to three-fourths of these amounts the children had a present right to receive on their coming of age; and that this right has been long since barred by section 8 of the Statute of Limitations of 1874.

This is admitted by counsel for the plaintiff; and the claim is confined to the one-fourth part in which Mrs. Lester was given a life estate. It is contended that the period of limitations in respect of this portion only began to run on her death in 1904. If the effect of the agreement was to put an end to her interest in the one-fourth part of the property described in the will, I am of opinion that a present right to receive the same by the children

thereby arose, and that they had only twelve years from that date within which to bring an action to enforce that right. Two answers were given to this proposition. It is said that the agreement in question only related to the purchase-money of the houses, to which I reply that this is contradictory of the terms of Mrs. Lester's receipt, and of the fact that the Gas shares were then transferred to the children in equal shares. It is also argued that the agreement was entered into by Mrs. Lester in the belief that all the bank shares had been purchased by her husband, and that, therefore, it did not bind her. There is no evidence one way or the other to satisfy me of the lady's state of mind; but, assuming that she had grounds for setting aside the agreement, she could only have done so by means of an action at law, which she never brought. For these reasons, I am of opinion that the plaintiff is not entitled to the substantial relief sought for in this suit. There are two small sums—one of £30 already mentioned, and the other of £13 14*s.*, rent received out of the unsold house—which the defendants in their defence expressed their willingness to pay to the three children, and which will be dealt with by our order. The judgment of the Master of the Rolls charges the defendant with one-fourth of the sum of £56 5*s.* 9*d.*, which the plaintiff alleges was part of the testator's assets invested by Joseph Horsford, the original executor, in the purchase of a brig, the price of which, when afterwards sold, appears to have been duly accounted for. I do not see how any liability attached to Mr. Crowley in respect of this claim.

Solicitor for plaintiff: *G. Allen.*
Solicitor for defendant: *F. O'Sullivan.*

R. ST. J. C.

Appeal, 1907.

May 6.

In re TYRRELL'S ESTATE (1).

Settlement—Construction—Perpetuity—Gift of rentcharge to a charity—Option to assign bonds to redeem rentcharge—No limit as to time.

By indenture, dated the 31st December, 1888, J. R. J. conveyed to H. C. J. certain freehold lands in fee, on trust to pay to J. R. J. £200 a year for life, and then to pay £90 per annum out of the rents of the said lands for the support of the Protestant religion, in accordance with the Thirty-nine Articles of the Church of England, within the parish of Castlejordan in the diocese of Meath, "Provided that the person or persons for the time being beneficially interested in the said estates, as the representative or representatives of the said J. R. J., shall, if he or they shall so think fit, in lieu of the said £90, pay the interest payable on eighteen Russian Imperial or railway bonds for £100 each to and for the aforesaid purpose," and to pay the residue of the rents of the lands in equal shares to his three daughters, Martha T., Mary W., and Anna M. J., respectively, during their joint lives; and, on the death of the said Martha T., her share of the residue of the rents to be paid to the heir-at-law of the said J. R. J., such heir to be ascertained from among his descendants, according to the same rules as are now applicable to the descent of the Crown of England among the descendants of King George I.; on the death of either of the other two daughters her share to be paid to the survivor, and on the death of the survivor, the entire share so payable to her to be paid to the heir of J. R. J., such heir to be ascertained as before directed.

J. R. J. died in 1892, and the lands having been sold to the tenants under the Land Purchase Acts:—

Held (reversing the decision of Ross, J.), that the proviso was void under the rule against perpetuities, and that the rentcharge of £90 a year could not be redeemed by assigning eighteen Russian bonds in lieu of the rentcharge.

Appeal by the Representative Church Body from the order of Ross, J., dated the 13th February, 1907. The facts are stated in the report of the case in the Court below, *ante*, p. 194. As some of the terms of the deed of the 31st December, 1888 (2), are referred to in the judgment of Fitz Gibbon, L.J., its contents are given here *in extenso*:—

(1) Before Sir Samuel Walker, C., and FitzGibbon and Holmes, L.JJ.

(2) Erroneously described *ante*, pp. 194, 196, as dated 4th December, 1887.

"This indenture, made the 31st of December, 1888, between Jasper Robert Joly of the one part, and Henry Charles Joly, hereinafter called 'the trustee,' of the other part. Whereas the said Jasper Robert Joly is seized in fee of the several lands and hereditaments, and rentcharges in lieu of tithes, in the schedule hereunto annexed particularly set forth. And whereas the said Jasper Robert Joly has three daughters, namely, Martha Anne, wife of Garrett Tyrrell, of Monasterbois, in the King's County; Mary Arabella, wife of Samuel Henry Webb, of Harcourt Street, in the city of Dublin, doctor of medicine; and Anna Maria Jane Joly, of Rathmines Road, aforesaid, spinster; and no other child or children; and he is desirous of settling the said lands, hereditaments, and rentcharges for the benefit of the said children, upon the trusts hereinafter mentioned. Now this indenture witnesseth that, in order to carry out the said desire, and in consideration of the natural love and affection which he hath for his said children, he, the said Jasper Robert Joly, doth hereby grant, release, and convey unto the said Henry Charles Joly all that and those the several lands and hereditaments in the first schedule hereto annexed set forth, and the several rentcharges in lieu of tithes in the second schedule hereto annexed set forth: to hold unto the said trustee, his heirs and assigns, as fully as the said Jasper Robert Joly now holds and enjoys the same, subject, however, to and upon the several trusts hereinafter mentioned, that is to say—1st, out of the rents, issues, and profits thereof to pay all necessary outgoings properly payable out of the same, together with any law costs and expenses to be incurred by the trustee in the management of the said property, including receiver's fees for collecting the said rents and rentcharges, such fees not to exceed the rate of five per cent. on the amounts received; 2ndly, to pay to the said Jasper Robert Joly an annuity of £200 per annum for and during his natural life, to be paid by four quarterly payments, on every 1st day of April, 1st day of July, 1st day of October, and 1st day of January, in each and every year, the first payment thereof to be made on the 1st day of April next after the date of these presents; 3rdly, to pay and apply £90 per annum out of the rents of the said lands for the support of the Protestant religion, in accordance with the Thirty-nine Articles of the Church of England, within the parish of Castlejordan, in the diocese of Meath, such payment to commence from the 1st day of May next: provided, however, that the person or persons for the time being beneficially interested in the said estates, as the representative or representatives of the said Jasper Robert Joly, shall, if he or they shall so think fit, in lieu of the said £90 pay the interest payable on eighteen Russian Imperial or railway bonds for £100 each to and for the aforesaid purpose; 4thly, to pay all the residue of the rents, issues, and profits of the said lands and premises in equal shares to the said Martha A. Tyrrell, Mary A. Webb, and Anna M. J. Joly, respectively, during

Appeal. 1907. *In re* TYRRELL'S ESTATE.

their joint lives, the share of each of the married daughters to be paid to her, respectively, as her sole and separate property; 5thly, on the death of the said Martha A. Tyrrell her share of the residue of the said rents and profits shall be paid to the heir-at-law of the said J. R. Joly, such heir to be ascertained from among his descendants, according to the same rules as are now applicable to the descent of the Crown of England among the descendants of his late Majesty King George I.; 6thly, on the death of either the said Mary A. Webb or Anna M. J. Joly, whichever shall first happen, the share of the said rents and profits theretofore payable to her shall be paid to the survivor of them, for and during her natural life, together with the original share payable to her; and upon the death of such survivor, the entire share so payable to her shall go to and be paid to the heir-at-law of the said Jasper R. Joly, such heir to be ascertained in manner before directed; 7thly, immediately after the death of the survivor of the said Martha A. Tyrrell, Mary A. Webb, and Anna M. J. Joly, if the said Jasper R. Joly shall have predeceased such survivor, and if not, then immediately after his death, the said trustee shall release and convey the said several lands, hereditaments, and tithe rentcharges to the heir-at-law of the said Jasper R. Joly, to be ascertained in manner hereinbefore directed."

Jasper R. Joly died on the 25th December, 1892; but his three daughters were alive. Henry Charles Joly died in 1891.

Garrett W. Walker, K.C., and *Cecil Darley*, for the appellants.

C. L. Matheson, K.C., and *Frank FitzGibbon*, for the respondent.

SIR SAMUEL WALKER, C.:—

In this case the material question is whether a proviso conferring an option on the equitable owners of an estate to redeem at any time a perpetual equitable rentcharge on that estate is void for perpetuity.

By a deed of 31st December, 1888, Jasper Robert Joly granted certain lands to Henry Charles Joly upon trust, *inter alia*, "to pay and apply £90 per annum out of the rents of the said lands for the support of the Protestant religion, in accordance with the Thirty-nine Articles of the Church of England, within the parish of Castlejordan in the diocese of Meath, such payment to commence from the 1st May next; provided, however, that the person or persons for the time being beneficially interested in the said

estates as the representative or representatives of the said Jasper Robert Joly shall, if he or they shall so think fit, in lieu of the said £90 pay the interest payable on eighteen Russian Imperial or railway bonds for £100 each to and for the aforesaid purposes."

As this is an equitable rent-charge granted to a charity, it is a perpetual one, and for the purpose of the argument it may be treated as if it were an equitable rent-charge granted in trust for A B, his heirs and assigns, with a similar proviso attached to the grant.

The definition of a perpetuity in Mr. Lewis' work (1) is—"A future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation."

In my opinion, the test whether the proviso in this case falls within that definition is whether it gives an interest in the land. If it does, it confers an equitable interest or equitable estate. The estate in the equitable rent-charge is taken away from the charity without its consent, and the estate in it vested in another—the persons theretofore liable to pay it—on payment at their option of a fixed purchase-money to be provided by bonds; and this right may be exercised at any period of time at the option of the persons whose estate is liable to the equitable perpetual rent-charge.

Mr. Matheson contended that, as there were in the first instance life estates limited in the lands, the right of redeeming, if exercised by the tenants for life, would not offend against the rule. That might be if there was a separate right given to the tenants for life; but it is well settled that in order to test the application of the rule against perpetuities the clause must first be construed in the ordinary way as if there were no such rule (*Pearks* v. *Moseley* (2)), and the right here is given to the "person or persons for the time being," *i.e.*, any time and for all time.

(1) Lewis on Perpetuity, p. 164. (2) 5 App. Cas. at p. 719.

Appeal. 1907.

In re TYRRELL'S ESTATE.

Sir Samuel Walker, C.

It is impossible, in my opinion, to draw any distinction between the effect of a proviso such as the present and a covenant giving the same right. The question is, whether an equitable interest in the land is given, and Sir George Jessel points out, in *London and South-Western Railway* v. *Gomm* (1), that "the mode in which the interest is created is immaterial." In my opinion, it is impossible to distinguish that case from the present in principle. In that case there was a deed by which a railway company sold some superfluous land, which they conveyed to P. in fee for £100, and P. covenanted with the company that he would, at any time, on getting six months' notice, and on receiving £100, re-convey the land to the company. The defendant purchased the land from P.'s heir with notice of the covenant. The company gave the defendant notice to re-convey the land, and he refused. It was held by the Court of Appeal that as the covenant in the deed gave to the company an executory interest in the land, to arise on an event which might occur after the period allowed by the rule as to remoteness, it was invalid. There was an express decision upon the point of perpetuity.

Jessel, M.R., said: "If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this, as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract, it is, of course, not obnoxious to the rule; but in that case it is impossible to see how the present appellant can be bound." Then, after pointing out why the appellant could not be bound by the covenant, he says: "The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for re-purchase is not different in its nature."

He then refers to the rule against perpetuities, and he says (p. 582): "Now is there any substantial distinction between a contract for purchase, or an option for purchase, and a conditional limitation? Is there any difference in substance between the case

(1) 20 Ch. D. 562.

of a limitation to A. in fee, with a proviso that whenever a notice in writing is sent and £100 paid by B. or his heirs to A. or his heirs, the estate shall vest in B. and his heirs, and a contract that whenever such notice is given, and such payment made by B. or his heirs to A. or his heirs, A. shall convey to B. and his heirs. It seems to me, that in a Court of Equity it is impossible to suggest that there is any real distinction between these two cases. There is in each case the same fetter on the estate and on the owners of the estate for all time, and it seems to me to be plain that the rules as to remoteness apply to one case as much as to the other."

We have also the opinion of Warrington, J., in *Woodall* v. *Clifton* (1), and in *Worthington Corporation* v. *Heather* (2), that even an option to purchase given to a lessee exercisable at an indefinite time is void for perpetuity.

We were pressed with the decision of Sir Andrew Porter, in *Switzer* v. *Rochford* (3), in which John Cooke granted a rent-charge of £30 per annum for a term of 500 years to trustees upon certain trusts, and charged it on leasehold premises with a proviso that it should be lawful for the grantor, his executors, administrators, or assigns, at any time during the 500 years to purchase or redeem the annuity for £300 (Irish), which was then to determine and be void, and it was held that the proviso was not void for remoteness. The Master of the Rolls attaches much importance to the circumstance that the grant of the rent-charge was one "secured by power of re-entry and distress, not worked out by the appointment of trustees, nor through the Statute of Uses, nor by a trust, but given directly by the instrument creating it, as at Common Law to the trustees of the settlement. There is no use under the Statute." In this case the rent-charge is equitable, and it is worked out by a trust; but if that distinction be not enough to validly distinguish *Switzer* v. *Rochford* (3) from *London and South-Western Railway Company* v. *Gomm* (4), I am unable to agree in the decision.

Ross, J., in the judgment appealed against, rightly points out that the rule against perpetuities has no application to a mere personal covenant, and he held that no interest in the land was

(1) [1905] 2 Ch. 257.
(2) [1906] 2 Ch. 532.
(3) [1906] 1 I. R. 399.
(4) 20 Ch. D. 562.

Appeal. 1907.

In re TYRRELL'S ESTATE.

Sir Samuel Walker, C.

given by the proviso—in other words, that it was a mere personal covenant. He says—"Where the contract does not create any estate or interest in property, it is not obnoxious to the rule. That is to say, a mere personal covenant, or a covenant that does not, so to speak, run with the land, though unlimited, is not void for perpetuity. An agreement to sell land, or to re-convey land, would appear to create an equitable interest in the land, and would thereupon be affected by the perpetuity rule. It is very hard to understand how the perpetuity rule can be applied at all to an agreement giving an option of purchase. No interest in the land is acquired until the option is exercised. In the case before me, I cannot see how the representatives of Jasper Robert Joly acquired by virtue of this proviso for option any interest in the hereditament or the lands. It is a personal or collateral covenant, unlimited, but not creating any interest in any lands."

I apprehend that, if he thought an equitable interest in the lands had been created by the proviso, his decision would have been different. As I have already said, I think an equitable interest in the lands was created within the principle of the decision in *Gomm's Case* (1).

There is no doubt that there are some established exceptions to the rule against perpetuities, such as contracts for the renewal of leases, and rights of entry, and rights of re-entry in leases. We find in text-books reasons assigned for distinguishing such cases, which reasons are probably satisfactory; but it must be remembered that the rule against perpetuities is Judge-made law, introduced by Judges to meet "the injurious effects of indestructible executory limitations, and springing and shifting uses under the Statute of Uses, just as the fiction of common recovery was invented to evade the statute *De Donis Conditionalibus*." Mr. Lewis says, at p. 128 of his book—"If such limitations should be allowed, it requires little argument to prove that the perpetuity of entail, the mischievous tendency of which led the Judges to evade the statute *De Donis Conditionalibus*, by the invention of common recoveries, would be revived in all its force and hurtfulness under the guise of springing, shifting, and future uses."

(1) 20 Ch. D. 562.

The learned judgment of the Lord Chief Baron, in *Attorney-General* v. *Cummins* (1), points out how differently this question stood at Common Law from what it does under the Statute of Uses.

In result, I am of opinion that this case is not distinguishable from that of *The London and South-Western Railway* v. *Gomm* (2). That decision has frequently since come before the English Courts, and has never been questioned. It seems to me, if I may say so, right in principle, and I think we should follow it, and allow the appeal.

The order of Ross, J., is probably in any event inaccurate in form, as his only function was to fix the redemption-price of the rent-charge under the Act of 1896; but I prefer to deal with the case in substance.

In our view the order must be discharged, and the rentcharge valued on the assumption that the proviso for its redemption is altogether void.

FitzGibbon, L. J.:—

I am by no means happy about this case; not that I have any doubt about our conclusion, but because, in the present condition of the law as to the application of the rule against perpetuities, I am afraid that our decision may be supposed to disturb provisions—such, for example, as provisions for fining down rent—not hitherto decided to be obnoxious to the rule.

I first consider the deed of the 4th December, 1887, as a piece of conveyancing. It is an instrument of the simplest character, operating as a conveyance and declaration of trust, and not by way of contract or agreement. The passages in the judgment of Ross, J.:—

> "The limitation may be bad, though the contract may be good. . . . It is very hard to understand how the perpetuity rule can be applied at all to an agreement giving an option of purchase. No interest in the land is acquired until the option is exercised. . . . It is a personal or collateral covenant, unlimited, but not creating any interest in any lands,"

(1) [1906] 1 I. R. 406. (2) 20 Ch. D. 562.

Appeal. 1907.

In re TYRRELL'S ESTATE.

Fitz Gibbon, L.J.

are not applicable to this deed, which is simply a grant of land out and out by an owner in fee to a trustee, declaring trusts subject to a certain proviso.

The parties are Jasper Robert Joly, "seized in fee," of the one part, and Henry Charles Joly, "the trustee," of the other part. It recites that the settlor had three daughters and no other child, and that he was desirous of settling the scheduled property for the benefit of the said children upon the trusts therein mentioned: it witnesses that for natural love and affection Jasper Robert Joly granted to Henry Charles Joly all the lands, &c., as fully as he held the same, subject, however, to and upon the several trusts mentioned, viz.:—Firstly, out of the rents and profits to pay all necessary outgoings; secondly, to pay to Jasper R. Joly £200 a year during his life; thirdly, to pay and apply £90 a year out of the rents of the lands for the support of the Protestant religion within the parish of Castlejordan. The charitable object only makes the rent-charge perpetual; the effect of the deed must be the same as if the trust were to pay £90 a year out of the land to A. B. and his heirs for ever. Then comes the proviso:—

> "Provided, however, that the person or persons for the time being beneficially interested in the said estates, as the representative or representatives of the said Jasper R. Joly, shall, if he or they shall so think fit, in lieu of the said £90, pay the interest payable on eighteen Russian Imperial or railway bonds for £100 each, to and for the aforesaid purpose."

If we might speculate on his intention, the settlor may have meant to empower the person at any time beneficially entitled to the lands subject to the rent-charge, if he so preferred, to acquire Russian bonds paying £90 a year, and to apply the interest on them to the charitable purpose, thereby for the time being satisfying the charge upon the land; but this would necessarily imply a power once and for all to discharge the lands by substituting bonds of the prescribed number for the capital charge, and substituting the interest on those bonds for the annual payment out of the rents.

But who was to exercise this optional power? Not the trustee, but the beneficiary for the time being representing the grantor. Therefore, so long as any limitation under the deed existed, this

option was to last, and as the limitations disposed of the fee, the power was to last for ever.

The next trust is to pay all the residue of the rents to the three daughters in equal shares during their joint lives, then on the death of one of them "her share of the residue of the rents" was to be paid to "the heir-at-law of the said Jasper Robert Joly, to be ascertained from among his descendants according to the rules applicable to the descent of the Crown of England among the descendants of his late Majesty King George I." The gist of that may be expressed in the words "being Protestants." We need not consider how it is to be worked out; it is not an ordinary limitation to heirs general, but it is intended as a limitation in fee to heirs specially designated.

The other two daughters took their shares with right of survivorship, with a limitation over on the survivor's death to the heir of Jasper R. Joly, to be ascertained as before directed; and the final direction makes it perfectly clear that the trustee was not to exercise the option as to the Russian bonds, for it directs him, immediately after the death of the last survivor of the daughters and of Jasper R. Joly, to convey the lands to the designated heir-at-law, who would thereupon become the beneficiary and representative of the settlor.

If this power could be treated as a covenant, I cannot see how it could be "a covenant that does not, so to speak, run with the land, though unlimited," which Ross, J., says "is not void for perpetuity"; though he says that "an agreement to sell land, or to re-convey land, would appear to create an equitable interest in the land, and would thereupon be affected by the perpetuity rule."

On my construction of the deed, I cannot distinguish its effect from that of the instrument in *Gomm's Case* (1), because the result is—as plainly put by Mr. Walker in his argument in the Court below—"an absolute gift of an interest in land, followed by a proviso giving a stranger an option to take an interest in the land in exchange for something which may, or may not, be valuable." The rentcharge of £90 a year was a perpetual estate in the land, and

(1) 20 Ch. D. 562.

Appeal. 1907.

In re TYRRELL'S ESTATE.

Fitz Gibbon, L. J.

the proviso was intended to enable any future holder of the property out of which that estate was carved, to buy it compulsorily for 18 Russian bonds, if he chose to do so. It is a power to purchase the rent-charge from the owners of it at a fixed price, given to a person having no *interest in that rent-charge*, but only owning the land out of which it issues. In my opinion, this is, in effect, a grant of a rent-charge to A. B., his heirs and assigns for ever, subject to an optional power to buy it, exercisable at any time, however remote, by any person who, for the time being, answers the description of the heir-at-law of Jasper R. Joly, ascertained as if he was a descendant of King George I, claiming the Crown of England. Such a power is, in my opinion, void.

HOLMES, L.J. :—

The order appealed from was presumably made by the Land Judge in exercise of the jurisdiction conferred on him by section 31 of the Land Law (Ireland) Act, 1896; and it might be said that his only duty was to fix the price in cash to be paid for the purchase or redemption of the annuity of £90. As, however, the value of this annuity must depend, at least to some extent, upon whether the proviso attached to it is operative, and as the argument in this Court turned almost entirely upon whether the proviso is valid or invalid, I propose to consider this question irrespective of any objection that might be taken to the form of the order.

The annuity is an equitable rent-charge, which has been declared by an order of the Vice-Chancellor, dated the 9th November, 1896, to be applicable for augmentation of the salary of the Church of Ireland Incumbent for the time being of the parish of Castlejordan.

The charitable purpose prevents the gift from being defeated by the rule against perpetuities, but is otherwise immaterial, and the proviso may be considered as if the rent-charge had been given to a person named, his heirs and assigns. If there followed or were attached to such a rent-charge a declaration that the person or persons for the time being beneficially interested in the estates as the representative or representatives of the settlor shall if he or they shall so think fit, in lieu of the said £90, pay the interest payable on eighteen Russian Imperial or railway bonds for

£100 each, what would be the construction and effect of the gift taken as a whole? Its language is vague and obscure; but the only meaning that I can attach to it is, that the owner for the time being of the lands charged with the rent-charge may at any time during its continuance purchase or redeem it by permanently appropriating eighteen Russian Government or railway bonds of £100 each upon trust to pay the income thereof for the purpose for which the rent-charge was given. This is the construction which counsel for the respondents ask us to adopt; and I think the only alternative would be to reject the proviso altogether on the ground that it is unintelligible. Does it, when so construed, violate the rule against perpetuities? I agree with Ross, J., that the law on this subject is not in a satisfactory condition, arising in a great measure, I think, from the difficulty of reconciling judicial decisions. This difficulty is illustrated by the authorities dealing with the question now under consideration. In *Switzer and Co., Limited*, v. *Rochford* (1), an annual rent-charge of £30 Irish, charged on leasehold premises, was granted to trustees upon certain trusts for a term of 500 years, with a proviso that it should be lawful for the grantor, his executors, administrators, and assigns, to purchase or redeem for £300 (Irish) the annuity which was then to determine and be void. Sir Andrew Porter, M.R., held that this proviso did not infringe the rule against perpetuities, and was not void for remoteness. He seems to have been impressed with the fact that the grant of the rent-charge was secured by power of re-entry and distress, and not worked out by the appointment of trustees or through the Statute of Uses, nor by a trust, but directly by the instrument creating it as at Common Law. He, therefore, came to the conclusion that *The London and South-Western Railway Company* v. *Gomm* (2), and other cases referred to, had little or no application. This decision, made in 1905 and reported in 1906, would naturally be regarded by Mr. Justice Ross as binding on him; and I confess I should find it difficult to distinguish it from the case now under appeal, although in the latter the rent-charge is equitable and worked out by a trust.

(1) [1906] 1 I. R. 399.

(2) 20 Ch. D. 562.

Appeal. 1907.

In re TYRRELL'S ESTATE.

Holmes, L.J.

We are, however, bound to compare *Switzer's Case* (1) with previous authorities, and form an independent judgment. It seems to me to be inconsistent with the principle acted on in *Gomm's Case* (2) by the English Court of Appeal in 1881, and never dissented from since. The question therein arose in relation to a grant in fee-simple of land by a railway company as to which the grantee covenanted that he, his heirs or assigns, would at any time thereafter, when requested by the company, re-convey to them on receiving £100. It was held by the Court of Appeal, reversing Kay, J., that as the covenant gave to the company an executory interest in land to arise in an event which might occur after the period allowed by the rules as to remoteness, it was invalid. The argument turned upon whether the covenant did or did not create an estate or interest in the land. Kay, J., held that it was merely a contract that did not run with the land; but as the defendant took the land with notice of it, he was bound in equity to perform it on the principle laid down in *Tulk* v. *Moxhay* (3). The Court of Appeal decided that the effect of the covenant, if it had been valid, would have been to create an interest in the land; and Sir George Jessel asked is there any substantial difference between a contract for purchase, or an option to purchase, and a conditional limitation. In the present case we have, by means of a condition, an option to purchase the rent-charge given to any person who might after the settlement become entitled to the lands out of which the rent-charge was payable. Unless the rule against perpetuities is different when applied to land granted in fee-simple, and when applied to the gift of a perpetual equitable rent-charge, the decision in *Gomm's Case* (2) rules the present question, and I can find no authority for such a difference. I am, therefore, of opinion that the appeal must be allowed.

It is hardly necessary to refer to the argument of Mr. Matheson that the persons now entitled to the lands under the settlement were living at its date. There would have been nothing illegal in the settlor giving them individually a power or option to purchase; but this is not what he has done. He has given it to

(1) [1906] 1 I. R. 399. (2) 20 Ch. D. 562. (3) 2 Ph. 744.

the person or persons for the time being beneficially interested in the estate. There is nothing better settled in this branch of law than that whether a gift is void for remoteness depends upon whether it may not take effect until after the expiration of the period prescribed by law for the creation of future interests. If this be so, the gift is invalid from the first, irrespective of what actually happened afterwards.

Solicitors for the petitioner: *T. T. Mecredy & Son.*
Solicitors for the Representative Church Body: *Maunsell, Darley, & Orpen.*

R. D. M.

In re SETTLED LAND ACTS and TUTHILL.
In re SETTLED LAND ACTS and WYNNE.

M. R.
1907.
Jan. 26.

Settled land—Sale to tenants—Person "deemed to be tenant for life"—Bonus—Leave of Court—Principle to be adopted—Exercising discretion—Costs—Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Land Act*, 1904 (4 *Edw.* 7, *c.* 34), *s.* 3—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 63—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 7.

A person who, by virtue of section 63 of the Settled Land Act, 1882, is "deemed to be tenant for life" of settled land is not entitled, as a matter of course, to an order, under section 7 (ii) of the Settled Land Act, 1884, giving the applicant leave to sell or proceed with a sale of the settled land.

The Land Acts of 1903 and 1904 have not altered the law in Ireland in this respect.

Under the circumstances, costs given to the applicants and trustees out of the proceeds of the sale of the settled land.

The judgment of Barton, J., in *In re Ievers* ([1904] 1 I. R. 492) adopted and applied.

Under marriage settlement, dated 1st January, 1880, John Fitzgerald Tuthill was tenant for life within the meaning of sect. 63 of the Settled Land Act of 1882, of (*inter alia*) one undivided thirteenth share of lands in Tipperary and Limerick, portions of which said lands were comprised in three originating applications lodged with the Estates Commissioners.

Barton, J. 1907.

In re KINAHAN'S TRUSTS.

disturbing priorities, until there are in existence both a fund, in which the assignor has an interest of which equitable possession can be taken, and a legal holder of the fund, to whom for that purpose, notice or knowledge can be brought home.

For these reasons I hold that the notice of November 6, 1905, was ineffectual, and that, as between himself and other incumbrancers who gave notice to the administrator, it was necessary for Jay, in order to protect his priority, to give fresh notice after the appointment of the administrator on November 25th. He did so in the subsequent correspondence in January and February, 1906. But in the meantime Barnett gave notice on December 20. Barnett, therefore, comes first in priority, and Jay second. All the other incumbrancers stand in the order of their subsequent notices to the administrator.

Solicitor for Walter Harding: *Elliot M'Neil.*
Solicitors for Daniel Jay: *William Fry & Son.*
Solicitor for S. Barnett: *James M. Magee.*
Solicitors for Gordon C. Frazer: *Barrington & Son.*
Solicitors for the administrator: *Torrens, Son, & Bristow.*

W. M'G.

IN THE MATTER OF THE ESTATE OF PATRICK DEVANEY, DECEASED, AND IN THE MATTER OF THE ESTATE OF ROSE DEVANEY, DECEASED.

M. R.
1907.
May 3.

M'GARRY *v.* KILCULLEN.

(1907. No. 214.)

Practice—Administration suit—Transfer to Civil-bill Court—Jurisdiction—Personalty, value of—County Officers and Courts (Ireland) Act, 1877 (40 *&* 41 *Vict. c.* 56), *ss.* 33, 36.

There is no jurisdiction, even on consent, under section 36 of the County Officers and Courts (Ireland) Act, 1877, to transfer an administration suit from the High Court to the Civil-bill Court, if the personalty exceed £500 in amount or value at the time of the commencement of the suit, although under that limit at the death of the person whose estate is to be administered.

The institution of the proceedings, and not the death of the testator or intestate, is the date at which the value of assets determining the jurisdiction to transfer is to be ascertained.

MOTION.

This was an *ex parte* application on behalf of the plaintiff, for an order, under section 36 of the County Officers and Courts (Ireland) Act, 1877, to transfer this matter to the Civil-bill Court for the county and division of Sligo, grounded on the consent to the transfer signed by the solicitors for the parties and the affidavit of the plaintiff's solicitor, sworn 2nd May, 1907. This matter was instituted by originating summons for the administration of the estate of Patrick Devaney, late of Carrowkeel, in the county of Sligo, farmer, deceased, who died on 3rd January, 1900, by the plaintiff, a daughter of the deceased, against the defendant, who was also a daughter of the deceased, and administratrix with the will annexed of his estate. The deceased had his last place of abode, and the plaintiff and the defendant resided, within the jurisdiction of the said Civil-bill Court. Patrick Devaney died on 3rd January, 1900, having made his will, dated 8th June, 1894, by which he bequeathed all his real and personal estate to his

M. R. 1907. *In re* TUTHILL.

is a real one. In the exercise of its discretion it should refuse the present application. The application is only granted where it is shown to be for the benefit of the estate : *In re Harding's Estate*(1); *In re Bagot's Settlement* (2) ; *Re Daniell's Settled Estates* (3). Here, if the application is granted, it will be to the detriment of the estate. The bonus is taken away from the remainderman, and the fact of it going to the tenant for life is apt to diminish the price : *In re Ely's Estate* (4).

Several cases show that the application will only be granted on express undertakings being given by the tenant for life that the estate will not suffer. Here the effect of the application is to deprive the estate of the bonus: *Re Newen* (5) ; *Re Wythes* (6) ; *Taylor* v. *Taylor* (7).

On equitable grounds the application should be refused. Mr. Tuthill has no greater equity than the trustee—in fact, much less, as he will appropriate this by-product of the sale for his own benefit. Equity Courts favour the view that the bonus should be added to the purchase-money, and be held on the trust of the inheritance : *In re Ely's Estate* (4) ; and only give the bonus to the tenant for life when compelled to do so by statute. The Irish Land Act of 1904 does not compel the Court in the present case to give the bonus to Mr. Tuthill. Mr. Tuthill does not come within the meaning of sect. 3 (1) of that Act until he gets the leave of the Court : see Cherry's Irish Land Acts (1906), p. 1161.

In re Iever's Settlements (8) is apparently against the contention of the trustee, but the discretion of the Court is to be exercised in every case according to its facts, and the decision of one Court in a particular case may indicate, but does not bind, the decision of another Court in another case : *In re Bagot* (9). *Re Stamford* (10) is distinguishable. There the application was granted because improvements were proposed for the benefit of the estate, and this was the reason assigned by Stirling, J., in his judgment at p. 485.

The costs should be paid by the tenant for life. This principle

(1) [1891] 1 Ch. at p. 64.
(2) [1894] 1 Ch. 177, at p. 181.
(3) [1894] 3 Ch. 503, at p. 504.
(4) [1904] 1 I. R. at p. 85.
(5) [1894] 2 Ch. at p. 306.
(6) [1893] 2 Ch. 369, at p. 374.
(7) L. R. 20 Eq. at p. 303.
(8) [1904] 1 I. R. 492.
(9) [1894] 1 Ch. at pp. 181, 184.
(10) 56 L. T. (N. S.) 484.

has been followed in the English cases : *In re Bagot* (1) ; *In re Newen* (2).

A similar application was made in the matter of the estate of Mr. Wynne. The facts relating thereto satisfied the Court that the proposed sale would be for the benefit of all parties interested under the settlement.

H. Wilson, K.C. (with him *Hayes*), in support of the application.

Messrs. Maunsell, Darley, & Orpen, Solicitors, appeared for the trustees.

THE MASTER OF THE ROLLS :—

I hope that the discussion which has taken place will serve a useful purpose. It is, I think, important that all parties concerned in the sale and transfer of estates in this country should understand clearly that a person who, by virtue of sect. 63 of the Settled Land Act, 1882, is "deemed to be" tenant for life of settled land in Ireland is not entitled, as a mere matter of course, to an order under sect. 7 (ii) of the Settled Land Act, 1884. The law has not been altered by the Irish Land Acts of 1903 and 1904. The most casual reader of the judgment delivered by Barton, J., in the case of *In re Iever's Settlements* (3), cannot fail to observe that the learned Judge acted on the principle established by numerous authorities—of which the cases cited by Mr. Mecredy (4) are typical examples—that applications under sect. 7 (ii) of the Act of 1884 must be dealt with by the Court in the exercise of judicial discretion applied to the circumstances of each particular case. The mere fact that the discretion is invoked in aid of a sale under the Irish Land Acts of 1903 and 1904 is not enough to justify the Court in giving an applicant leave to sell or proceed with a sale of the settled land.

(1) [1894] 1 Ch. at p. 181.

(2) [1894] 2 Ch., Kekewich, J., at p. 306.

(3) [1904] 1 I. R. 492.

(4) *In re Bagot's Settlement* ([1894] 1 Ch. 177); *In re Daniell's Settled Estates* ([1894] 3 Ch. 503).

M. R. 1907.

In re Tuthill.

The Court must be satisfied that the sale, if carried out, will be for the benefit of all parties interested under the settlement.

In the case already referred to, Barton, J., was satisfied on the facts before him that the sale was "an advantageous one for all parties concerned, or entitled under the settlement." Being so satisfied, he gave his sanction to the sale, notwithstanding the provisions of sect. 48 of the Act of 1903 and sect. 3 (1) of the Act of 1904. In the present cases I am satisfied, on the facts before me, that the proposed sales will result in benefit to all parties interested under the respective settlements. The terms arranged are satisfactory.

No doubt the terms arranged would be still more satisfactory to the parties interested—other than the proposed vendors—if the percentage payable under section 48 was in each case to be added to the purchase-money; but I follow the decision of Barton, J., in reference to this somewhat delicate matter, and I respectfully adopt his language (pages 495, 496):—"It is, in my opinion, no objection to an application of this kind that the applicant, if he is otherwise acting honestly and for the advantage of all persons interested, may be influenced by an inducement which the Legislature has, for reasons of public policy, held out to him, or that he will gain a benefit which the Legislature has expressed an intention of conferring upon him. In the absence of any other objection to the application, I see no sufficient ground for withholding the leave of the Court."

With regard to the question of costs, I confess I have felt considerable difficulty in dealing with the costs of the applicants. The arguments of Mr. Conner and Mr. Wilson, however, have convinced me that in the present cases, at all events, the applicants are entitled to an order directing their costs to be paid out of the proceeds of the respective sales. The trustees are entitled to a like order.

Solicitors for the applicants: *Fry & Son*; *Hayes & Son*.
Solicitors for the trustees: *Mecredy & Son*; *Maunsell, Darley, & Orpen*.

R. W. L.

IN THE MATTER OF THE ESTATE OF EDWARD WALKINGTON THOMSON, OWNER; CHARLES O'CONNELL, ADMINISTRATOR OF CATHERINE RICHARDSON, DECEASED, PETITIONER (1).

Appeal.
1907.
April 28.

Landlord and tenant—Land Purchase Acts—Redemption of liability for rent out of estate indemnified therefrom—Right over against indemnifying lands—Land Law (Ireland) Act, 1896 (59 & 60 *Vict. c.* 47), *s.* 33 (4).

Where a rent is payable in respect of lands sold under the Land Purchase Acts, but the lands have a right of indemnity against other lands, sect. 33 (4) of the Land Law (Ireland) Act, 1896, creates, in favour of the person who has paid the redemption price, a rent on the indemnifying lands equal in amount to the portion of the rent which has been redeemed, in like manner as if such person had purchased the same:—

Held, by the Court of Appeal (reversing the order of Ross, J.), that, for the purpose of securing the hypothetical purchaser, the rent so deemed to have been purchased must be secured as part of the original rent, and ranks therefore *pari passu* with the unredeemed portion of such original rent.

APPEAL from an order of Ross, J., dated 5th February, 1907, declaring the annual sum of £16 7*s.* 5*d.*, being the amount of an apportioned part of a fee-farm rent of £404 5*s.* 2*d.*, payable out of the lands sold in this matter, and redeemed out of the purchase-money, to be puisne to the unredeemed portion of the said head-rent.

The following statement of the facts is taken from the judgment of Mr. Justice Ross, reported *supra*, at p. 191:—

By an Incumbered Estates Court conveyance, dated 15th April, 1852, certain townlands of Clontygora North and Clontygora South and Edentubber were conveyed, subject, in conjunction with other lands, to an entire fee-farm rent of £404 5*s.* 2*d.*, reserved by an indenture of fee-farm grant, dated 15th April, 1852 (made in lieu of a lease for lives renewable for ever), with such rights of indemnity in respect of an annual sum of £15 13*s.* 10*d.*, part thereof,

(1) Before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1907. *In re* THOMSON'S ESTATE.

against part of the lands comprised in the grant known as Hall's part of Monascreebe as were given by an indenture, dated 29th July, 1818, but liable to bear the residue of the said rent in indemnification of all the other lands liable thereto. The lands of Killeen, which were sold in this matter, are portion of the other lands liable to the said rent, and were, by another Incumbered Estates Court conveyance, dated 9th May, 1855, conveyed, subject to the said rent of £404 5*s.* 2*d.*, with the like right of indemnity in respect of the said annual sum of £15 13*s.* 10*d.*, and also indemnified against the residue of the said rent by the said lands of Clontygora North and Clontygora South and Edentubber. By an order, dated 7th March, 1906, £16 7*s.* 5*d.*, part of the said rent of £404 5*s.* 2*d.*, was apportioned on the said lands of Killeen, and the residue of the rent on the residue of the lands comprised in the fee-farm grant; and, by an order, dated 14th June, 1906, the said yearly sum of £16 7*s.* 5*d.* was ordered to be redeemed out of the purchase-money of Killeen.

D. F. Browne, K.C., and *Pigot*, for the appellant:—

The appellant is, by sect. 33, sub-sect. 4, of the Act of 1896, put in the same position as if he had actually purchased a portion of the original fee-farm rent, amounting to £16 7*s.* 5*d.*, from the owner of such fee-farm rent. It is clear that what before was a rent remains a rent still, and should be treated as such, and not as an annuity. The rent deemed to have been purchased is therefore not puisne to, but ranks *pari passu* with, the balance of the original fee-farm rent which has not been redeemed.

[They cited *Owen's Estate* (1); *Kennedy's Estate* (2); and *Mulchinock's Estate* (3).]

H. Wilson, K.C., and *Macrory*, for the respondents:—

The order appealed from was right. We contend that the rent of £16 7*s.* 5*d.* has, so far as the grantor is concerned, become extinguished altogether; the landlord has lost so much of the lands and so much of the rent; the balance of the original fee-farm rent is a first charge on the balance of the lands, and has

(1) [1900] 1 I. R. 169. (2) [1902] 1 I. R. 364. (3) [1903] 1 I. R. 142.

priority over the £16 7*s.* 5*d.*, which is only *deemed* to have been purchased, for the purpose of giving the purchaser the power to exercise his right of indemnity. The true construction of the section is that it merely provides a measure of indemnity as against the indemnifying lands.

SIR SAMUEL WALKER, C. :—

We think that the way in which sect. 33, sub-sect. 4, must be worked out is in a manner different from that adopted by Mr. Justice Ross in his order (1).

The section provides that—[His Lordship read the section]. Now that right of indemnity admittedly exists in this case, and the person entitled to the purchase-money is declared to be entitled to the proportion of the rent redeemed "in like manner as if he had purchased the same," that is, as if he had purchased the apportioned rent of £16 7*s.* 5*d.* from the owner of the rent of £404 5*s.* 2*d.*

That is a very plain section, which can, in my opinion, only bear one interpretation. When the person entitled to the purchase-money has made this presumable purchase, the landlord having the redemption price in his pocket, the former stands in the position of the landlord to the extent of £16 7*s.* 5*d.*; but the order of Mr. Justice Ross declares that he is puisne in respect of that to the remaining rent of £387 17*s.* 9*d.*, which is the balance of the rent of £404 5*s.* 2*d.*, after providing for the £16 7*s.* 5*d.* That, I think, is contrary to the section, under which the person entitled to the purchase-money is treated as the owner, just the same as if the owner had sold his portion of the original fee-farm rent to him; and the argument that we are asked to adopt is, in effect, that the landlord is to be treated as if still the owner of the rent of £16 7*s.* 5*d.*, although holding the amount of its redemption price in his pocket.

The landlord is not within the purview of the section at all; it is the person who has made this presumable purchase from the landlord. The order appealed against does not carry out that. The new annuity is declared inferior to the unredeemed portion, and such annuity is declared to be "without prejudice to the

(1) *Ante*, p. 191.

Appeal. 1907.

In re THOMSON'S ESTATE.

rights of all persons and lands liable to the unredeemed portion of the said rent."

We do not think that is warranted by the section, and therefore this appeal must be allowed.

FITZGIBBON, L.J. :—

This case affords one more instance of the difficulty of working out an enactment that a thing shall be deemed to be what it is not.

The person redeeming is entitled to a security for the price of the apportioned amount of the rent redeemed "in like manner as if he had purchased the same." Reading—in the description of what he is to be deemed to have purchased, this means—"As if he had purchased a rent of £16 7*s.* 5*d.*, being part of the fee-farm rent of £404 5*s.* 2*d.*, created by the fee-farm grant of April 15, 1852."

The power to apportion and redeem the rent is given for the purpose of clearing the title to the fee-simple of the lands sold, upon certain terms with respect to securing the amount of the redemption price, which terms have nothing to do with the lands sold. In my opinion, no power is given to create a *new rent* of £16 7*s.* 5*d. puisne* to the unredeemed balance of the fee-farm rent, amounting to £387 17*s.* 9*d.*, which remains payable out of the indemnifying unsold lands; but the Court must give to the man who is deemed to have purchased the rent of £16 7*s.* 5*d.* the same rights and remedies as if he had bought so much of the original fee-farm rent of £404 5*s.* 2*d.*, which, for the purpose of securing the hypothetical purchaser, must be deemed to be still continuing, and payable out of the lands in respect of which the claim arises.

It follows that the rent of £16 7*s.* 5*d.* which is to be deemed to have been purchased, must be secured as part of the original fee-farm rent, and is therefore payable *pari passu* with the unredeemed residue of that rent.

HOLMES, L.J. :—

Dealing with this section as in the case of other sections, the first thing I look at is what the Legislature has done; and if from that I can ascertain a meaning clear and free from ambiguity, I do not trouble with the reasons why the legislation was passed.

Here we have got a section that, admittedly, applies to this case; and the only thing that we have to ascertain is what it is that is to be done in the application of the section to the case.

The section is, to my mind, as clear as it can be, and I do not intend to add anything to what has been already said by the Lord Chancellor and Lord Justice FitzGibbon.

Solicitors for the appellant: *T. F. O'Connell & Son.*
Solicitors for the respondent: *S. S. & E. Reeves & Sons*

R. ST. J. C.

IN RE MOORE, DECEASED.
(LONG *v.* MOORE.)
(1907. No. 315.)

Barton, J. 1907. April 29. May 11.

Gift of land to charity—Will—Republication by subsequent codicil—Death of testator within three months—Validity of gift—7 & 8 Vict. c. 97, s. 16.

A charitable gift of land is not invalidated merely by the fact that the will containing it is confirmed and republished by a codicil made less than three months before the death.

A testator, by a will executed more than three months prior to his death, devised the residue of his property, consisting partly of lands, to a charity. By two codicils, both executed less than three months prior to his death, the testator made some additional bequests in favour of certain persons, the only effect of which, as regards the residue, was to reduce it, and otherwise he confirmed his will:—

Held, that the devise of the lands for charitable purposes was not invalidated.

BY his will dated 6th January, 1906, John Davis Moore, of 18 Monaghan Street, Newry, appointed Robert J. Long and James Hendren executors and trustees of his will, and, after certain legacies, bequests, and directions, devised and bequeathed the residue of his real and personal estate to his trustees and executors upon trust "for and to pay over the same to or for the benefit of the society formed in Belfast in the year 1866, called the Presbyterian Orphan Society.'"

Barton, J.
1907.
LONG
v.
MOORE.

By a codicil to his will dated 21st August, 1906, testator bequeathed a legacy of £50 to a legatee therein named, and in all other respects confirmed his said will.

By a second codicil to his will, dated 7th September, 1906, testator declared certain trusts concerning property belonging to him in Belfast, to take effect upon the death of the survivor of the persons to whom it had already been devised and bequeathed for life by his will, and in all other respects confirmed his will as altered by the former codicil thereto.

Testator died on the 9th September, 1906, less than a month after the execution of the first codicil, and three days after the execution of the second codicil to his will, and probate of the will and codicils was granted to Robert J. Long and James Hendren, the executors named in the will, on the 31st October, 1906.

Portion of the residue devised in trust for the Presbyterian Orphan Society consisted of certain house property in Belfast.

The question raised was, whether the devise of lands for a charitable purpose was invalidated by the fact that the will containing the devise was confirmed and republished by codicil, executed less than three months before the death of the testator.

Cusack, for the executors and trustees.

Megaw, for the Presbyterian Orphan Society :—

There is no reported authority on the question, but the Courts have always assumed that the actual date of the execution of the will was the crucial date. Section 16 of the 7 & 8 Vict. c. 97, requires that the will should be duly "executed" three calendar months at the least before the death of the testator. A codicil only affects publication, and not execution. The distinction is apparent in the Wills Act, section 9, which prescribes the requisites for valid execution. Section 23 of that Act is distinct legislative authority to the effect that a codicil, unless it expressly revokes a will, shall not prevent the operation of the will. Since the Wills Act every will speaks as if executed just before testator's death, but this does not affect the validity of gifts of land to charities where the will is actually executed three months

before death. *Powys* v. *Mansfield* (1) is an authority that a codicil is not a republication of the will for all purposes. In *Hopwood* v. *Hopwood* (2) Lord Campbell lays down that the effect of a codicil does not necessarily operate as if the will had been made at the date of the codicil. *Stilwell* v. *Mellersh* (3) is an authority to the same effect. Section 16 of the 7 & 8 Vict. c. 97, refers to the actual date on which the will was executed. Republication only brings down the date for the purpose of construing the provisions of the will, and determining what is the subject matter that passes by the will.

S. L. Brown, K.C., for the next-of-kin :—

The effect of the codicil is to bring down the will to the date of the codicil. The republication of the will thereby operates as a confirmation of it, and, therefore, the death of the testator within three months of the execution of the codicil avoids the charitable gift : *In re Rayer* (4) ; *In re Fraser* (5)

BARTON, J. :— May 11.

The question for decision is whether this residuary charitable devise is invalidated by section 16 of the Charitable Donations and Bequests Act, 1844, which enacts that no devise for charitable uses in Ireland shall be valid to create any estate in lands " unless the will or other instrument containing the same shall be duly executed three calendar months at least before the death of the person executing the same." The will, in which this devise was contained, was executed on January 6th, 1906. The testator died, more than eight months afterwards, on September 9th, 1906. But, in the interval, and less than three months before his death, he executed two codicils by which, after making some additional benefactions in favour of certain individuals, he otherwise confirmed the will. The only practical effect of those alterations, so far as this charitable devise was concerned, was to *pro tanto* reduce and postpone it. It is contended that the repub-

(1) 3 My. & Cr. 359.
(2) 7 H. L. Cas. 728, at p. 740.
(3) 20 L. J. (N. S.) Ch. 356.
(4) [1903] 1 Ch. 685.
(5) [1904] 1 Ch. 726.

Barton, J. 1907.

LONG v. MOORE.

lication of the will, by bringing it down to the date of the codicils, caused this devise to be contained in a will executed less than three months before testator's death, and so invalidated it. That contention is, in my opinion, unsustainable. The devise did not infringe either the language of the section, or its policy, which was to prevent "the mischief of improvident alienations or dispositions by languishing and dying persons." The Wills Act (see sections 23 and 34) affords no support to the objection, which rests upon what I think is a misunderstanding or misapplication of the rules about republication of wills.

It is well settled that for many purposes republication brings the will down to the date of the codicil, and makes it speak as a new will of that date, and take effect as if it had been reinserted in the codicil and re-executed at the date of the codicil. But it is equally well settled that there are limits to the doctrine. "The rule is subject to the limitation that the intention of the testator is not to be defeated thereby": *per* Patteson, J., in *Doe d. Biddulph* v. *Hole* (1). "It does not necessarily operate as if the will had been originally made at the date of the codicil:" *per* Lord Campbell, C., in *Hopwood* v. *Hopwood* (2). The effect of the decision of the Court of Appeal in *Mountcashell* v. *Smyth* (3) is that republication republishes the will with all its contents, including its original date. It is as if the old document, with its old date, were translated into the codicil. Republication gives to the will a fresh starting-point, but it does not erase the old date. Nor does it, in my opinion, falsify the fact that the will contained a particular devise and was executed at a particular time. The authorities which have been cited lead me to the conclusion that the Courts have always treated the principle that republication makes the will speak as if it had been re-executed at the date of the codicil not as a rigid formula or technical rule, but as a useful and flexible instrument for effectuating a testator's intentions, by ascertaining them down to the latest date at which they have been expressed.

A glance at a few of the best known cases will, I think, support this view of the effect of republication. The Court has, by

(1) 15 Q. B. 848, 858. (2) 7 H. L. Cas. 728, 740. (3) [1895] 1 I. R. 346.

regarding a will as re-executed by republication, been enabled to validate a legacy to a witness to the original will: *Anderson* v. *Anderson* (1); to add to the will unattested papers which were sufficiently referred to in the will for purposes of identification and incorporation, but were not written and signed until after its execution: *Truro's Case* (2); to include, in a number of cases under the old law, after-acquired lands in a devise, from which they would otherwise have been excluded; and since the Wills Act, to ascertain, whenever it is necessary to do so, intention as regards after-acquired property by reference to both will and codicil: see *In re Farrer* (3) and *In re Champion* (4). Again, where a husband purported by his will to exercise in his wife's lifetime a power which had been given only to the survivor of the husband and wife, and the wife died after the will but before the codicil, the republication was held to validate the exercise of the power: *In re Blackburn* (5). Where a legacy was given subject to legacy duty, and a subsequent statute substituted succession duty for legacy duty, republication after the passing of the statute enabled the Court to give effect to the presumed intention of the testator that the legacy should be subject to the substituted duty: *In re Rayer* (6). Where a legatee of a legacy, which was excepted from a general bequest, died after the will, the contents of a subsequent codicil republishing the will enabled the Court to infer a continuance of intention to except the legacy from the general bequest: *In re Fraser* (7).

On the other hand, the Courts have never allowed the republication of a will to contradict the acts or frustrate the intentions of a testator. Republication does not revive a legacy which has in the *interim* been revoked, adeemed, or satisfied: *Powys* v. *Mansfield* (8); *Hopwood* v. *Hopwood* (9). Again, republication has been held not to render a power less beneficial to the grantee on account of a subsequent departure from a custom referred to in the will as regulating the power: *Doe d. Biddulph* v.

(1) L. R. 13 Eq. 381.
(2) L. R. 1 P. & D. 201.
(3) 8 Ir. C. L. R. 370.
(4) [1893] 1 Ch. 101.
(5) 43 Ch. D. 75.
(6) [1903] 1 Ch. 685.
(7) [1904] 1 Ch. 726.
(8) 3 My. & Cr. 359.
(9) 7 H. L. Cas. 728.

Barton, J. 1907.

LONG v. MOORE.

Hole (1). It has also been held that the date of the original execution remains as a factor for the construction of the will, for example, when it is necessary to determine the date to which adverbs of time occurring in the will are referable: *Mountcashell* v. *Smyth* (2).

In short, the aim of the Court has always been to apply the rules as to republication, with good sense and discrimination, for the purpose of as far as possible effectuating *up to date* the intentions of testators. But the real date and the real facts connected with the original execution of the will are not altered or falsified. They can, whenever for any purpose they are material and relevant, be proved and referred to, either for the construction of the will, or for the purpose of ascertaining some fact or deciding some question relating to the will.

I have no difficulty in saying that this devise was, as a matter of fact, contained in a will executed more than three months before the death of testator, and that it was not invalidated, merely because it was confirmed and republished by a codicil made within the disabling period.

Solicitor for the trustees: *W. Johnson.*
Solicitor for the Presbyterian Orphan Society: *R. T. Martin.*
Solicitors for the next-of-kin: *Henry & Son.*

J. MAC M.

(1) 15 Q. B. 848. (2) [1895] 1 I. R. 346.

IN RE KINAHAN'S TRUSTS AND TRUSTEE ACT, 1893.

(1907. No. 275.)

Barton, J.
1907.
April 22, 29.

Mortgage of equitable interest in personalty—Priority—Administrator—Notice before administration granted—Notice to trustees of original and derivative funds.

Priorities, as between mortgagees of the distributive share of one of the next-of-kin of an intestate, rank according to the dates of the notices given to the administrator after administration has been taken out. Notice given before administration has been taken out to a possible or future administrator, even if he be also the holder of a fund out of which moneys may be payable to the future administrator, are ineffectual for the purpose of obtaining priority as against other mortgagees who give notice to the administrator after he has obtained administration.

APPLICATION to fix the priorities of incumbrances affecting funds in Court. By his will Frederick Kinahan left certain legacies to Charles Albert Kinahan, and appointed his widow and his brother, John Kinahan, his executors. Frederick Kinahan died 17th March, 1902, and probate of his will was granted to the executors on the 28th May, 1902. Charles Albert Kinahan died intestate on the 4th February, 1905, before the assets of Frederick Kinahan were distributed, and letters of administration were, on the 25th of November, 1905, granted to John Kinahan, who was also one of the executors of Frederick Kinahan's will. About five-sixths of the personal estate of Charles Albert Kinahan consisted of the legacies to which he was entitled under the will of Frederick Kinahan. One of the next-of-kin of Charles Albert Kinahan was Lieutenant Frederick William Kinahan, and the net amount of the distributive share to which he was entitled under the intestacy was £589 13*s.*, which had been lodged in Court under the Trustee Relief Act, by the administrator, John Kinahan. The claimants against the said sum were as follows:—Daniel Jay, who claimed to be entitled to £120 under a mortgage dated 6th November, 1905, of which

Barton, J. 1907. *In re* KINAHAN'S TRUSTS.

notice had been given to John Kinahan on 6th November, 1905; S. Bennett, £130 under a mortgage of 20th December, 1905, of which notice was given to John Kinahan on 20th December, 1905; Gordon C. Frazer, £60 under mortgage of 3rd April, 1906: notice, 3rd April, 1906; William Codrington, £87 mortgage, 20th April, 1906: notice, 21st April, 1906; Carlo Gangitano, £70 mortgage, 6th August, 1906: notice, 17th August, 1906; Pasquale Spasiano, £18 4*s.* mortgage of 6th August, 1906, notice 17th August, 1906; and Walter Harding, £100 mortgage, 2nd October, 1906. After 25th November, 1905, when administration was granted to John Kinahan, there was a correspondence between Daniel Jay's solicitors and the solicitors for John Kinahan, which was relied upon as notice, and which correspondence is sufficiently referred to in the judgment of Mr. Justice Barton. The main question raised was as to the validity of the notice given by Daniel Jay on 6th November, 1905, before administration was granted to John Kinahan.

Longfield, for Walter Harding, submitted that Daniel Jay's mortgage of 6th November, 1905, was postponed to the other mortgages by reason of John Kinahan, to whom notice was given, not having obtained administration to Charles Albert Kinahan until a later date. The notice given by Daniel Jay was not a valid notice at all, because at the time there was no legal holder of the fund regularly constituted: *Johnstone* v. *Cox* (1); *In re Dallas* (2); *Ward* v. *Duncombe* (3); *Saffron Waldon Building Society* v. *Rayner* (4).

Boyd, for Daniel Jay, the first mortgagee, contended that the notice given on the 6th November, 1905, was perfectly good. There was at the time of the notice a fund, and a legal holder of it, to whom the notice was given: *Etty* v. *Bridges* (5); *Bridge* v. *Beadon* (6); *Lloyd* v. *Banks* (7); *Rickards* v. *Gledstanes* (8).

(1) 16 Ch. D. 571.
(2) [1904] 2 Ch. 385.
(3) [1893] A. C. 369.
(4) 14 Ch. D. 406.
(5) 2 Young & Coll. C. C. 486.
(6) L. R. 3 Eq. 664.
(7) L. R. 3 Ch. 488.
(8) 31 L. J. (N. S.) Ch. 142.

Apart from that notice, however, there was a subsequent correspondence which gave clear notice to the administrator.

James O'Connor, for S. Barrett.

Poole, for Gordon C. Frazer, referred to *Stephens* v. *Green* (1).

Kinahan, for the administrator, John Kinahan.

BARTON, J.:— April 29.

This is a contest for priority between the several mortgagees of Lieutenant Frederick Kinahan's distributive share of the personal estate of his brother, Charles Kinahan, who died intestate on February 4th, 1905. Administration of Charles Kinahan's personal estate was, on November 25th, 1905, granted to John Kinahan. The priorities, in my opinion, rank according to the dates of the respective notices given by the several incumbrancers to John Kinahan after November 25th, 1905, when administration was granted to him. Two questions were discussed at the Bar, both of which seem to me to be covered by authority. But it is, perhaps, unusual for both of them to arise in the same case; and Mr. Boyd presented the claim of his client, Daniel Jay, with such force and seriousness, that, I think, I should state my reasons for not acceding to his contention.

It was, in the first place, contended by Mr. Boyd that the previous notice given by Jay to John Kinahan, on November 6th, was effective, because John Kinahan was then about to take out, and afterwards did take out, a grant of administration. But it is well settled that a notice, which is given by the mortgagee of an expectancy of this kind to a possible or future trustee or debtor, is futile for the purpose of obtaining priority, as against other mortgagees or assignees, who give notice to the actual trustee or debtor after the trust or debt has come into existence. The case is in principle undistinguishable from the Army Agents' cases, *e.g.*, *Addison* v. *Cox* (2) and *Johnstone* v. *Cox* (3). In the former case, Lord Selborne said (at p. 79) that a notice in such a case is

(1) [1895] 2 Ch. 148. (2) L. R. 8 Ch. 76. (3) 16 Ch. D. 9 Ch. D. 17.

Barton, J. 1907. *In re* KINAHAN'S TRUSTS.

effective "so long as the person who receives the notice is himself bound by some contract or obligation, existing at the time when the notice reaches him, to receive and to pay over, or to pay over if he has previously received, the fund out of which the debt is to be satisfied." In *Johnstone* v. *Cox* (1), Jessel, M.R., said: "You cannot give notice to a man so as effectually to bind him when no debt is owing by him, though it may become so afterwards." These principles were, in *In re Dallas* (2), applied to the case of a notice sent to a person who was not yet, but afterwards became administratrix. In that case, which really governs the present one, Buckley, J., after discussing this as well as other questions, said (at p. 404):—"The result is that I come to the conclusion that the priorities will rank according to the date of the notice given to the administratrix after administration was granted." Buckley, J.'s, judgment was affirmed in the Court of Appeal.

Mr. Boyd contended, secondly, that the notice of November 6th was effective, because John Kinahan was at that date an executor of old Frederick Kinahan's will, and as such was legal holder of a fund from which, as it afterwards turned out, five-sixths of Charles Kinahan's personal estate was derived. But that contention cannot be supported. It proceeds upon a notion—once prevalent, but now exploded—that when there are two settlements or trusts, one original and the other derivative, notice, for the purpose of priorities in respect of the derivative settlement or trust, can be effectively given to the trustees of the original settlement or trust so long as they hold the property. Reference was made to *In re Booth's Settlement Trusts* (3), and to the dictum of Lord Romilly in *Bridge* v. *Beadon* (4). But the former case has been treated as overruled, and the dictum in the latter case as unreliable, since the decision in *Stephens* v. *Green* (5). The executor of old Frederick Kinahan's will was under no obligation to pay Charles's legacy to Charles's next-of-kin. His obligations in the matter would be to Charles Kinahan's administrator, when raised; and the latter would be the immediate trustee for the next-of-kin of

(1) 19 Ch. D. 17, 20.
(2) [1904] 2 Ch. 385. [239.
(3) 1 W. R. 444; 21 L. T. (O. S.)
(4) L. R. 3 Eq. 664, 667.
(5) [1895] 2 Ch. 148, 160–162.

Charles, and the only person under an obligation to pay to them their distributive shares (if any) of that estate. Until administration was taken out to Charles Kinahan there was no fund, and no holder of any fund, out of which his next-of-kin had a right to claim payment; and there was no immediate trustee for them with all a trustee's obligations to them. It follows that, until administration was taken out to Charles Kinahan, there was no person to whom, and no fund as to which, any really effective notice could be given by a mortgagee of a next-of-kin's share for the purpose of priorities as against other mortgagees who, after administration was taken out, gave notice to the administrator.

This result is consistent with the principle which lies at the root of the general rule, known as the rule in *Dearle* v. *Hall* (1), which, in the case of equitable interests in personal estate, regulates priorities among incumbrancers or assignees for value by reference to the dates of the notices given by them to the trustees. It is often said, in connexion with that rule, that the notice "perfects the title of" the assignee, or "converts the trustee into a trustee" for him. But while these are convenient and expressive phrases or figures of speech, they do not quite convey a strictly accurate or complete statement of the origin and principle of the rule: per Lord Macnaghten in *Ward* v. *Duncombe* (2). The rule seems to have originated in the provisions of the Bankruptcy law as to the acts necessary to take a chose in action out of the order and disposition of a bankrupt. The mortgagee or assignee, by the notice to the trustee or by the latter's knowledge of the assignment or incumbrance, is supposed to take or obtain equitable possession of the fund or chose in action, which is thereby regarded as having been taken out of the apparent ownership and possession of the *cestui que trust* or assignor. But these equitable operations cannot be carried out prospectively. An expectancy or possibility can, in equity, be assigned; but, even in equity, it cannot be taken possession of until it has materialised. Accordingly where the expectancy in an equitable interest in personal estate has been assigned, notice or knowledge is ineffectual for the purpose of

(1) 3 Russ. 1.
(2) [1893] A. C. 369, 392.

Barton, J. 1907.

In re Kinahan's Trusts.

disturbing priorities, until there are in existence both a fund, in which the assignor has an interest of which equitable possession can be taken, and a legal holder of the fund, to whom for that purpose, notice or knowledge can be brought home.

For these reasons I hold that the notice of November 6, 1905, was ineffectual, and that, as between himself and other incumbrancers who gave notice to the administrator, it was necessary for Jay, in order to protect his priority, to give fresh notice after the appointment of the administrator on November 25th. He did so in the subsequent correspondence in January and February, 1906. But in the meantime Barnett gave notice on December 20. Barnett, therefore, comes first in priority, and Jay second. All the other incumbrancers stand in the order of their subsequent notices to the administrator.

Solicitor for Walter Harding: *Elliot M'Neil.*
Solicitors for Daniel Jay: *William Fry & Son.*
Solicitor for S. Barnett: *James M. Magee.*
Solicitors for Gordon C. Frazer: *Barrington & Son.*
Solicitors for the administrator: *Torrens, Son, & Bristow.*

W. M'G.

IN THE MATTER OF THE ESTATE OF PATRICK DEVANEY, DECEASED, AND IN THE MATTER OF THE ESTATE OF ROSE DEVANEY, DECEASED.

M. R.
1907.
May 3.

M'GARRY *v.* KILCULLEN.

(1907. No. 214.)

Practice—Administration suit—Transfer to Civil-bill Court—Jurisdiction—Personalty, value of—County Officers and Courts (Ireland) Act, 1877 (40 & 41 *Vict. c.* 56), *ss.* 33, 36.

There is no jurisdiction, even on consent, under section 36 of the County Officers and Courts (Ireland) Act, 1877, to transfer an administration suit from the High Court to the Civil-bill Court, if the personalty exceed £500 in amount or value at the time of the commencement of the suit, although under that limit at the death of the person whose estate is to be administered.

The institution of the proceedings, and not the death of the testator or intestate, is the date at which the value of assets determining the jurisdiction to transfer is to be ascertained.

MOTION.

This was an *ex parte* application on behalf of the plaintiff, for an order, under section 36 of the County Officers and Courts (Ireland) Act, 1877, to transfer this matter to the Civil-bill Court for the county and division of Sligo, grounded on the consent to the transfer signed by the solicitors for the parties and the affidavit of the plaintiff's solicitor, sworn 2nd May, 1907. This matter was instituted by originating summons for the administration of the estate of Patrick Devaney, late of Carrowkeel, in the county of Sligo, farmer, deceased, who died on 3rd January, 1900, by the plaintiff, a daughter of the deceased, against the defendant, who was also a daughter of the deceased, and administratrix with the will annexed of his estate. The deceased had his last place of abode, and the plaintiff and the defendant resided, within the jurisdiction of the said Civil-bill Court. Patrick Devaney died on 3rd January, 1900, having made his will, dated 8th June, 1894, by which he bequeathed all his real and personal estate to his

M. R. 1907.

M'Garry v. Kilcullen.

wife, Rose Devaney, for life or widowhood, and on her death or marriage (in default of appointment by her), to her children in equal shares. The estate of Patrick Devaney did not, at the date of his death, so far as it was personalty, excluding chattels real, exceed in amount or value £500, and so far as it consisted of lands, did not exceed the annual value of £30. The said estate at that date consisted of certain farming implements, stock, and moneys, to the value, according to defendant's contention, of about £100, or, according to the plaintiff's contention, of about £300 or £400, and of a farm of land containing 33 acres, situate at Carrowkeel, in the county of Sligo, held as a judicial tenancy under the Earl of Erne, at the yearly rent of £17 10*s.*, and of the annual value of £23 10*s.*

Patrick Devaney left six children—the plaintiff, the defendant, and four others. On 26th April, 1904, Rose Devaney, his widow, died without having married again, intestate, and without having exercised her power of appointment. On 18th December, 1905, the defendant took out letters of administration of the estate of Rose Devaney, who had some money and farming stock of her own on the lands of Carrowkeel; and on 6th January, 1906, the defendant took out letters of administration with the will annexed of the estate of Patrick Devaney: and on 17th February, 1906, she sold the said lands of Carrowkeel by public auction to the plaintiff for the sum of £500, which was paid by the plaintiff to the defendant.

On 21st February, 1907, the plaintiff issued an originating summons for the administration of the personal estate of Patrick Devaney and also of Rose Devaney; and on 19th March, 1907, an order for administration of the said estates was made by the Master of the Rolls.

R. G. L. Leonard, in support of the application :—

The power to transfer exists if the suit or proceeding pending in the High Court might have been commenced in the Civil-bill Court : 40 & 41 Vict. c. 56, s. 36. The Civil-bill Court has jurisdiction in all suits by creditors, legatees, &c., in which the estate sought to be administered, "so far as it is personalty, shall not exceed in amount or value the sum of five hundred pounds, and

so far as it consists of lands shall not exceed the annual value of thirty pounds": *ibid.*, sect. 33. The question is, whether the value of the estate for the purpose of this section is to be taken at the date of the death of the testator, or at the time of the institution of the suit, *i.e.* the issue of the originating summons. At the date of the death of the testator, and down to the sale of the farm, which was a chattel real, and not included in the term "personalty" in this Act, by virtue of the definition in sect. 31, the Civil-bill Court had jurisdiction, as the personalty was under £500. The sale, however, of the farm by the administratrix in 1906 increased the personalty, and made it exceed £500. There is no reported case on the point; but it is submitted that what took place afterwards should make no difference if the suit could originally have been brought in the Civil-bill Court.

THE MASTER OF THE ROLLS:—

In my opinion there is no jurisdiction to transfer this suit under sect. 36 of the Act of 1877. That section only gives power to transfer a suit which might have been commenced in the Civil-bill Court. Whether this suit might have been commenced in the Civil-bill Court depends on the true meaning of section 33 of the same Act, which gives jurisdiction to the Civil-bill Court (*inter alia*) "in all suits . . . in which the estate against or for an account or administration of which the demand may be made, so far as it *is* personalty, shall not exceed in amount or value the sum of £500; and so far as it *consists* of lands shall not exceed the annual value of £30." As I read the section, the extent of the jurisdiction conferred is measured by the nature and value of the property at the date of the commencement of the suit, and it is not possible to say that this suit was one in which the estate sought to be administered, so far as it was personalty, did not exceed £500 in value at the time the suit was instituted. Whatever may be the state of things at the time of the death of the testator, if, at the time when a suit for administration of his assets is instituted, the personalty exceeds £500 in value, there is, in my judgment, no jurisdiction to transfer the suit to the Civil-bill Court.

Solicitor for the plaintiff: *J. M'Carthy.*

W. L.

Barton, J.
1907.

Jan. 19.
Feb. 6.

Appeal.
May 3.

PIM *v.* COYLE.

(1907. No. 286.)

Local registration of title—Registered owner—Transfer of interest in lands—Registration of judgment mortgage—Subsequent registration of transfer—Priority—Local Registration of Title (Ireland) Act, 1891 (*54 & 55 Vict. c.* 66), *ss.* 25, 35.

Section 25 of the Local Registration of Title (Ireland) Act, 1891, applies only to conveyances prior to the first registration, and does not apply to transfers of registered land, which are governed by section 35. Under the latter section a transferee acquires no title until he is registered as owner, and his title does not relate back, but is subject to burdens registered prior to the registration of his title.

A registered owner of lands entitled to a beneficial interest therein transferred the lands to the defendant, who delayed to register his title. In the meantime the plaintiffs, having recovered judgment against the registered owner, registered their judgment in the Local Registration of Title Office a few hours before the defendant was registered as owner:—

Held, by the Court of Appeal (affirming the decision of Barton, J.), that the first registered owner of the lands had not effectually parted with the beneficial interest in the lands at the date of the judgment and its registration, and that consequently the judgment mortgage charged and affected such interest in priority to the title of the defendant.

CIVIL-BILL APPEAL.

Margaret Coyle, the mother of the defendant, was the registered owner, subject to equities, of the lands of Lisinigan, situate in the county of Cavan, under the provisions of the Local Registration of Title Act, 1891.

Margaret Coyle having a beneficial share or interest in the lands, by an instrument of transfer dated 14th April, 1905, transferred the lands to her son, the defendant. The defendant neglected to register his title until 4th May, 1905, upon which day, at 3.31 o'clock, p.m., he registered his title as owner. In the meantime, the plaintiffs, namely, on 2nd May, 1905, recovered judgment against Margaret Coyle for £200 debt and £10 costs, and registered

their judgment under the Local Registration of Title Act, 1891, on 4th May, 1905, at 11 a.m., several hours before the defendant was registered as owner.

On the 3rd March, 1906, the plaintiffs issued an equity civil-bill against the defendant to have it declared that the sum of £200 debt and £10 costs was well charged upon the defendant's interest in the above-mentioned lands, and for a sale and receiver. The County Court Judge dismissed the equity civil-bill, and the plaintiffs appealed from that decision.

At the hearing of the appeal his Lordship, upon the application of the plaintiffs, amended the equity civil-bill by adding, instead of the prayer therein, the following :—"That the principal sum of £210, and interest thereon at 4 per cent., from the 2nd May, 1905, be declared well charged on the beneficial interest which Margaret Coyle had in the lands of Lisinigan at the date of plaintiffs' judgment and of its registration as a mortgage, prior to the registration of defendant's title as owner of said lands."

The question raised was whether or not the defendant's title on being registered on 4th May, 1905, related back to the date of the execution of the transfer, viz., 14th April, 1905, and whether Margaret Coyle had effectually parted with her beneficial interest in the lands by that unregistered transfer; or whether her beneficial interest remained so as to be chargeable by the judgment mortgage until the transferee was registered as owner.

Jonathan Pim, for the plaintiffs, contended that the transfer of 14th April conferred no estate upon the transferee until he was registered as owner of the lands so transferred; that section 25 of the Local Registration Act, under which a registered title related back to the date of conveyance, applied only to conveyances before the first registration, and that the effect of the registration of a transfer of registered land was regulated not by section 25 but by section 35; that Margaret Coyle did not effectually part with her beneficial interest in the lands by the transfer until the transferee was registered as owner of the lands transferred; that, consequently, the registration of plaintiffs' judgment as a mortgage charged and affected the beneficial interest which Margaret Coyle still had at the date of the judgment; and that the subsequent registration of

Barton, J. 1907. PIM v. COYLE.

defendant's title vested in him an estate which was subject to plaintiffs' previously registered burden.

Law Smith, K.C., for the defendant, argued that sect. 25 of the Local Registration of Title Act was general in its terms and application, and was not limited to conveyances before first registration, and that the defendant's title on registration related back to 14th April, 1905, the date of the instrument of transfer; that the provisions of sect. 35 as to the transfer of registered land were superfluous and unnecessary, having regard to the terms of sect. 25; that Margaret Coyle had, consequently, effectually parted with all her beneficial interest in the lands by the unregistered transfer of 14th April, 1905; that the registration of the judgment under the Local Registration of Title Act had no greater effect as against a transfer not registered in the Local Registration of Title Office than the registration of a judgment in the Registry of Deeds would have had against a conveyance not registered in the Registry of Deeds; that the register was not absolutely conclusive in all cases as shown by sect. 81 (5) of the Act; and that the defendant would apply, if necessary, to amend the register by deleting plaintiffs' burden.

[He referred to *Eyre* v. *M'Dowell* (1).]

Feb. 6. BARTON, J. :—

In my opinion the plaintiffs are entitled to the relief claimed in their amended Equity Civil Bill. The judgment mortgage could, of course, only charge and affect any beneficial interest which Margaret Coyle had at the date of the judgment: *Eyre* v. *M'Dowell* (1). But she had not, at that date, effectually parted with her beneficial interest, because the transfer deed was inoperative to confer any estate in the lands on the transferee until he was registered as owner (sect. 35). The transferee, meanwhile, had his right to be registered; and other equities may have arisen as between him and the transferor. But no estate, legal or equitable, passed from the transferor to the transferee until registration. On registration, an estate vested in the transferee, but subject, *inter*

(1) 9 H. L. Cas. 619.

alia, to the burdens, if any, registered as affecting the land (sect. 36). No transferee of registered land is safe until and unless he registers his title. Meanwhile the transferor may create burdens, which, if registered before the transfer, may take priority. I need not discuss cases where there is fraud or mistake, or some equity against the plaintiff; because there is no suggestion of fraud or mistake in this case, or of any equity against the plaintiffs. The only person affected is the defendant; and he has only himself to blame for having neglected to sooner register his title.

It was contended that sect. 21 (2) helps the defendant, because, if this Act had not passed, a conveyance of the lands, although unregistered in the Registry of Deeds, would have operated to transfer an estate to the grantee. But that would not have been in "consequence of" or "by reason of" the registration of the judgment mortgage; it would have been because the conveyance did not require registration in the Registry of Deeds in order to be operative. The consequences of the registration of the judgment mortgage must not be confounded with the consequences of the registration of the instrument of transfer. Sect. 21 (2) is conversant with the former consequences; but this case turns mainly on the latter consequences. "The consequences of" the registration of the judgment mortgage and "the rights, powers, and remedies acquired and possessed by reason of" that registration are the same as if the Act had not passed. But the consequences of the registration of the instrument of transfer are altered by sects. 35, 36, and 45, which do not in this respect conflict with sect. 21 (2).

As regards sect. 25, I think it has not been disputed that, ever since the passing of the Act, it has been generally assumed, both in the profession and by the registering authority, that sect. 25 was intended to apply to conveyances before the first registration. But the section is not quite explicit on the point, and it has never been the subject of any judicial decision. I am of opinion that the current opinion is correct. Sect. 25 occurs in a group of four sections which deal with first registration. They commence with section 22. Then comes sect. 27, dealing with subsequent registrations. A provision dealing with conveyances before first registration was necessary. In such a provision it would be

Barton, J. 1907.

PIM v. COYLE.

consistent with all the purposes of the Act to provide that the conveyance should, on being registered, relate back to the date of its execution; because the first registration of ownership is the starting-point of the register, and no harm would be done by the relating back of the first entry on the register. But to hold that section 25 governs subsequent transfers of registered land would render sections 35 and 36 superfluous and inconsistent, and would strike at the root of the usefulness of the register as a record of ownership and burdens.

For all these reasons I am of opinion that whatever beneficial interest Margaret Coyle had in the lands at the date of the transfer remained in her until the transferee was registered as owner; and that the judgment mortgage, by being registered before the transfer, charged and affected the beneficial interest which Margaret Coyle had at the date of the judgment.

J. MAC M.

Appeal. May 3.

The defendant, by leave of Barton, J., appealed to the Court of Appeal by case stated. His Lordship stated the following questions for the determination of the Court of Appeal (1):—

1. Does section 25 of the Local Registration of Title Act apply solely to conveyances before a first registration of ownership?

2. Is the effect of a transfer of registered land regulated by sect. 25 or by sect. 35 of the Act?

3. Did defendant's title on being registered at 3.31 p.m. on 4th May relate back to the date of the execution of the transfer of 14th April?

4. Did Margaret Coyle effectually part with her beneficial interest in the lands by the unregistered transfer of 14th April? or did her beneficial interest remain so as to be chargeable by the judgment mortgage until the transferee was registered as owner on 4th May at 3.31 p.m.?

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

5. Are plaintiffs entitled upon the facts stated, and the incorporated documents, to the relief claimed in the equity civil-bill as amended?

Law Smith, K.C., and *T. J. Smith*, for the appellant.

S. L. Brown, K.C., and *Jonathan Pim*, for the respondents.

SIR SAMUEL WALKER, C.:—

In this case we are of opinion that the decision of Barton, J., is right, and that it is the only way the legislation can be worked. Sect. 21 of the Act regulates judgment mortgages, and its effect is to put a judgment mortgage, when registered in the Registry of Titles, upon the same footing as would have been acquired if the affidavit had been registered in the Registry of Deeds, if this Act had not passed. Sect. 25 regulates the registration of ownership declared to be compulsory by the Act—"A person shall not under any conveyance executed on or after the commencement of this Act acquire any estate in any such land until he is registered as owner of the land; but, on being so registered, his title shall relate back to the date of the execution of the conveyance, and any dealings with the land before the registration shall have effect accordingly." The only reasonable construction of that section appears to be that of Barton, J., that it is confined to the registration of land for the first time. The words in sub-sect. 1, "dealings with the land," must mean unregistered dealings, otherwise there would be a conflict between that section and section 35, which provides that "a registered owner of land may transfer the land, or any part thereof, and the transferee shall be registered as owner of the land transferred"; and sub-sect. 2 enacts that "there shall be executed on the transfer an instrument in the prescribed form, or in such other form as may appear to the registering authority to be sufficient to convey the land, but until the transferee is registered as owner of the land transferred, that instrument shall not confer on the transferee any estate in the lands."

Accordingly, in this case the interest in the lands remained in Mrs. Coyle until the transfer which she executed in favour of her son, the defendant, was registered. The interest in the lands

Appeal. 1907.

PIM v. COYLE.

Sir Samuel Walker, C.

remained in her, and the judgment mortgage could and did operate on that interest. There would thus be no conflict between sect. 25 and sect. 35.

If Mr. Law Smith's argument be right, a serious alteration in the law was made by section 25; because, as pointed out during the argument, the existing law as to the conflict between registered and unregistered deeds would be altered, and titles would have related back. Our decision does not conflict with *Eyre* v. *M'Dowell* (1). It never could have been intended to make such an alteration in the law, because the object of the Act was that you can go to the Registry of Titles and see what is there. In my opinion, the only reasonable view is that adopted by Barton, J.

FITZ GIBBON, L.J.:—

I concur. The general intention of the Local Registration of Title (Ireland) Act, 1891, was that from and after the first registration of the ownership of any freehold land, the priority of the dealings and burdens affecting that land should be governed by the dates of their registration. Though much impressed by the argument of counsel for the respondents that sect. 25 applies to the first registration only, I do not find it necessary to so decide. We should not hold sect. 25 to be inconsistent with any other section unless forced to do so, and, for our present purpose, it is enough to say that whether sects. 25 and 35 are read together or distributively, they prevent any estate from vesting in the transferee, and they leave the ownership in the transferor until registration.

Section 25 says that where registration is compulsory:—

> "A person shall not, under any conveyance executed on or after the commencement of this Act, acquire any estate in any such land until he is registered as owner of the land; but, on being so registered, his title shall relate back to the date of the execution of the conveyance, and any dealings with the land before the registration shall have effect accordingly."

If that means that, as against dealings registered in the meantime, the registration is provisional or defeasible only, extraordinary

(1) 9 H. L. Cas. 619.

consequences might follow—a person might by deed put a burden on the estate, delay the registration, and afterwards, by a deed duly registered, transfer the property to a purchaser, and then the owner of the burden, being prior in point of time, could, by registering his deed, get in front of the purchaser, become prior by relation back, though subsequent in registration, and defeat the registered owner. These consequences may be avoided if the words of this section can be applied to unregistered dealings only, or by reading them as subject to the other provisions of the Act which regulates the priority of all registered dealings by the dates of registration.

There can be no doubt that, after land has once been registered, you must look to the register, and you may rely upon it, for the priority of registered dealings *inter se.* Mr. Smith contended that because—before the Local Registration of Title was introduced—the estate in the land would have passed out of the transferor on the execution of the deed, and would so have escaped the "statutory judgment mortgage" under *M'Dowell's Case* (1), therefore it must still escape it; but the Act of 1891 expressly kept the estate in the transferor until registration, and the earlier deed did not operate upon the land at all—as against subsequently registered dealings—until it was registered. The statutory judgment-mortgage, when registered as a burden, affected the land as provided by section 45 (2), by section 36, and other sections, and it bound all the estate which was in the registered owner at the date of registration, including the interest which the Act itself kept in her until the registration of the previous deed; and the subsequent registration of a prior deed of transfer, which the transferee had neglected to register, could not, by relation, displace the previously registered burden.

In my opinion, any other construction of the Act would not only be contrary to its language, but would defeat its purpose by making the registered title liable to defeasance.

HOLMES, L.J.:—

Barton, J., in his judgment, said:—"As regards section 25, I think it has not been disputed that ever since the passing of the

(1) 9 H. L. Cas. 619.

Appeal. 1907.

PIM v. COYLE.

Holmes, L.J.

Act it has been generally assumed, both in the profession and by the registering authority, that section 25 was intended to apply to conveyances before the first registration. But the section is not quite explicit on the point, and it has never been the subject of any judicial decision. I am of opinion that the current opinion is correct."

I agree with the view of Barton, J., and of the registering authority. The reason I do so is that if I were to come to a different conclusion there would be a conflict between section 25 and section 35. Construing section 25 in the way suggested, I have no difficulty when I come to section 35. Its effect was to put Mr. Brown's client, who was a judgment mortgagee, in a better position than before the Act; but it did not interfere with the principle acted on in *Eyre* v. *M'Dowell* (1). The whole estate of the mortgagor still remained in her at the time of the judgment mortgage, and until the transfer, which she executed to her son, was registered; but the judgment mortgage, having been previously registered, it charged her entire interest in the lands. This is in accordance with *Eyre* v. *M'Dowell* (1).

The order made by the Court was:—

"THE COURT doth answer questions 3, 4, and 5 as follows:—The beneficial interest which Mrs. Coyle had in the registered land in the case mentioned was, in the opinion of the Court, vested in her at the date of the registration of the plaintiffs' judgment mortgage in the Local Registration of Titles Office on the 4th May, 1905, so as to become then chargeable by the said judgment mortgage as a burden affecting the said interest; and the estate in the said land which vested in the defendant on the subsequent registration of the transfer to him at 3.31 p.m. on the same day was subject to the burden so previously registered: Accordingly, in the opinion of the Court, the plaintiffs are entitled, upon the facts stated and the incorporated documents, to the relief claimed in the equity civil-bill as amended. The Court does not answer questions 1 and 2."

Solicitors for the plaintiffs: *Molloy & Molloy.*
Solicitor for the defendant: *Louis Smith.*

R. D. M.

(1) 9 H. L. Cas. 619.

M'CORMICK *v.* DUKE (1).

Appeal.
1907.
May 8, 9, 17.

Fraud—Mortgage executed with blanks for date, name of mortgagee, amount to be advanced, and rate of interest—Common agent—Mortgage executed with such blanks, and entrusted to agent for specific purpose, fraudulently appropriated by him to satisfy a past debt of his own.

D., who was induced by his solicitor and agent G. to become interested in a company which G. alleged was about to be floated, raised through G. several sums of money by mortgage on D.'s property for the purposes of the company. On the 13th February, 1906, D. signed a document at the solicitation of G. without reading it or even knowing its nature. It was, in fact, a mortgage by him of certain lands of which he was owner, blanks being left for the date, name of mortgagee, amount of advance, and rate of interest. M., another client of G., had placed, three years previously, £900 in his hands for investment, which G. appropriated to his own use, paying interest to M., and representing that it was invested on mortgage. In March, 1906, G. filled up the blanks in the mortgage, inserting 1st December, 1905, as its date, M. as mortgagee, £900 as the amount advanced, and £7 per cent. as the rate of interest. No money whatever was paid to D. on foot of this instrument, and it did not appear in a schedule of indebtedness furnished afterwards by G. to D. M., having become alarmed about G.'s position, repeatedly pressed for payment of the £900; and, under threat of criminal proceedings, G. handed over the mortgage on the 17th July. He immediately afterwards absconded, and was adjudicated bankrupt.

The Court of Appeal, being of opinion that no money of M. was obtained on the faith of this instrument; that the only consideration for its delivery was the debt due by G. to M.; that M. had notice that the recital of payment on the 1st December, 1905, was false; and that G., in giving it, was violating his duty to D.:—

Held, that the instrument gave no rights to M. against D. or his estate.

APPEAL by the defendant from an order of Barton, J., dated the 6th February, 1907, whereby he declared that an indenture of mortgage dated 1st December, 1905, was a valid security, not as a deed but as an instrument in writing, for any moneys in fact advanced by plaintiffs to defendant on foot of it through their

(1) Before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1907.

M'CORMICK v. DUKE.

common agent; and an inquiry was directed at Chambers to ascertain what sum, if any, was advanced on the security of said instrument.

This order was made upon a summons adjourned into Court, in which Lizzie M'Cormick, Theresa M'Cormick, and Brigid M'Cormick were plaintiffs, seeking to establish the validity of the mortgage against the defendants, the Rev. Roger Philip Duke and his trustee in bankruptcy, Thomas Turketine.

By the mortgage, which was expressed to be made between the defendant Duke of the one part, and the three plaintiffs of the other part, Duke, as beneficial owner, purported, in consideration of £900 "this day paid" to Duke by the plaintiffs, to grant to the plaintiffs, their heirs and assigns, first, the lands of Crossna, otherwise Taundresshogue, in the county of Roscommon, and the lands of New Park, otherwise Ballinamoney, Clooney, Gasall, and Ardee, in the county of Sligo; and, secondly, the lands of Rossmore and Emlagh, Tonagh, Rosskelly, and Cartron, in the county of Sligo; to hold subject to redemption on payment of said sum of £900, with interest at 7 per cent. The mortgage contained the usual covenants for the payment of principal and interest. There was no receipt for the mortgage money at foot of the deed. The deed purported to be executed by Duke, and was also executed by Lizzie M'Cormick, her signature being attested by J. J. Beatty, solicitor, and Wm. J. Walshe, his assistant.

The lands were held by Duke in fee-simple.

On 23rd July, 1906, a receiving order in Bankruptcy was made by the High Court of Justice in England against Duke, and the defendant Turketine was appointed Receiver.

An affidavit to resist the application was made by Duke, from which the following facts appeared:—

On the death of his father in 1906, he succeeded to the lands described in the mortgage, together with other Irish property. He became acquainted with Mr. Harold Charles Geoghegan, solicitor, who, in 1904, suggested that Duke should employ him to carry out sales to tenants under the Land Acts, and Duke's title deeds were handed over to Geoghegan.

In September, 1905, Geoghegan induced Duke to become interested in a company alleged then to be in process of formation,

called the Hydroscope Company, to acquire and work an invention to see clearly under water; and to aid in its flotation Geoghegan persuaded Duke to execute two mortgages, dated 9th December and 30th December, 1905, for £700 and £350 respectively, of his estates to Mr. John Wolfe, and a third mortgage on the 13th February, 1906, for £675, in favour of Mr. Duncan Ramsay Blair. The moneys thus raised were paid to Geoghegan for the purposes of the intended company. Duke never heard of the plaintiffs being mortgagees of his estates, or claiming to be so, until July, 1906, when he received a letter from their solicitors, Messrs. Vincent & Beatty, demanding immediate payment of £900. Duke's signature to the mortgage, bearing date 1st December, 1905, was witnessed by Mr. Douglas Ampleford, solicitor, who was at the time an assistant in Geoghegan's office. From his affidavit, filed on behalf of the plaintiffs, it appeared that the mortgage in question, and several others, together with the memorials for registry, were all prepared and executed in blank. Duke gave the following account of the transaction in paragraph 6 of his affidavit:—"The only occasion on which I ever signed any document in his" (Ampleford's) "presence, or had any business relations with him, was on the 13th February, 1906, in London, as to which I have a distinct recollection. On that day I was returning with the said Harold C. Geoghegan in a cab from the office of the said Duncan Ramsay Blair, where I had just executed a mortgage in favour of the said Mr. Blair for £675, when the said Harold C. Geoghegan stopped the cab at the Metropole Hotel, as I was driving to Waterloo Station on my return home to Verwood, and there got me to execute a document, my signature to which was witnessed by the said Douglas Ampleford. I am unable to state the nature of the document, nor did I read it over; and I positively swear that neither on that occasion, nor on any subsequent occasion, was the name M'Cormick mentioned to me by the said Harold C. Geoghegan, or any other person." Ampleford proved the signing of the mortgage in blank in his presence on the occasion in question at the Hotel Metropole. He swore that the names of the mortgagees (the plaintiffs), the amount and rate of interest were filled in by him in March, 1906, and the date 1st December, 1905, inserted at that time, under the direction of Geoghegan. The

Appeal. 1907.

M'CORMICK v. DUKE.

name and address of Duke as a party to the deed were in it when he executed it.

Miss Lizzie M'Cormick proved that Geoghegan acted as solicitor for herself and her sisters, and that in 1903 they gave him £900 for investment. This was invested in a mortgage of property belonging to a Mrs. Christian. This mortgage was paid off, and Miss M'Cormick stated, but only on hearsay, that the money was reinvested on Duke's mortgage of the 1st December. The plaintiffs knew nothing of the transactions between Geoghegan and Duke. They were paid interest on the £900 by Geoghegan up to December, 1905. The plaintiffs made repeated applications to Geoghegan about the money, who made several appointments with them, but put them off from time to time with evasive excuses. The plaintiffs then employed Messrs. Vincent & Beatty to act for them, and these gentlemen, after threatening Geoghegan with criminal proceedings, succeeded in getting from him in July, 1906, the mortgage of the 1st December, 1905, which was neither stamped nor registered. On the 17th July, 1906, they had the mortgage stamped (paying £10 penalty) and registered.

In June, 1906, Duke instituted proceedings against Geoghegan in the King's Bench Division in England for an account, and Geoghegan signed an acknowledgment of indebtedness dated the 3rd July, 1906, setting forth in the schedule thereto the particulars of moneys received by Geoghegan from or on behalf of Duke. The schedule included, among other securities, the mortgages to Wolfe and Blair, but did not mention the mortgage of the 1st December, 1905.

Jellett, K.C., and *De Renzy*, for the appellant :—

We contend that this instrument was inoperative either as a mortgage or an instrument in writing: *Hibblewhite* v. *M'Morine* (1); *Fox* v. *Martin* (2); *Swan* v. *North British Australasian Co.* (3); *Powell* v. *London and Provincial Bank* (4). *Ex parte Sargent* (5)

(1) 6 M. & W. 200.
(2) 64 L. J., Ch. 473.
(3) 2 H. & C. 175; 7 H. & N. 603.
(4) [1893] 2 Ch. 555.
(5) L. R. 17 Eq. 273.

will be relied on by the respondents' counsel, but that case is distinguishable upon the facts: see judgment of Lord Selborne in *France* v. *Clarke* (1). Geoghegan was agent of the respondents, and he was not agent of the appellant for the purpose of converting the instrument into a mortgage to the respondents; he had no authority to do so, and what was done was only for the purpose of staving off a prosecution. The respondent is not estopped by having signed the instrument in blank, that doctrine being confined to negotiable instruments: *Swan* v. *North British Australasian Co.* (2). He cannot be held responsible by reason of his negligence, unless such negligence be the proximate cause of the appellant's loss. That is negatived by the facts of the case, as the respondents advanced the money to Geoghegan in 1903, and the appellant did not meet Geoghegan until 1904. His negligence, accordingly, occasioned no loss to the respondents.

Matheson, K.C., G. W. Walker, K.C., and *R. M'Gowan*, for the respondents:—

The document signed by the appellant was operative as an instrument in writing creating a valid charge: *Ex parte Sargent* (3). The appellant is estopped from denying his signature, which is admittedly his, and not a forgery. The instrument was given by him to Geoghegan to enable the latter to raise money on the appellant's property, and the appellant is responsible for the consequences of his acts. The extent of Geoghegan's authority was not the measure of the appellant's liability: *Lloyd's Bank, Ltd.*, v. *Cooke and others* (4). "The principal, who gave him the means of committing it, must bear the consequences of his agent's fraud," *per* Lord Watson in *Brocklesby* v. *Temperance Building Society* (5).

[They also cited *Perry Herrick* v. *Attwood* (6); *The King* v. *Inhabitants of Ridgwell* (7).]

(1) 26 Ch. D. 257, at p. 264.
(2) 2 H. & C. 175; 7 H. & N. 603.
(3) L. R. 17 Eq. 273.
(4) [1907] 1 K. B. 794.
(5) [1895] A. C. 173, at p. 183.
(6) 2 De G. & J. 21.
(7) 6 B. & C. 665.

Appeal. 1907.

M'Cormick v. Duke.

May 17.

Sir Samuel Walker, C. :—

The plaintiffs in this action, who are three ladies named M'Cormick, claim to be mortgagees for a sum of £900 on certain lands of Roger Philip Duke, situate in the counties of Roscommon and Sligo. He had been adjudicated a bankrupt in England on the 25th July, 1906, and the Official Receiver of his estate has been joined as a defendant.

The alleged mortgage purports to bear date the 1st December, 1905, and Mr. Justice Barton, by his judgment, dated the 6th February, 1907, has declared it to be a valid security, not as a deed, but as an instrument in writing for any moneys which were in fact advanced by plaintiffs to defendant Duke on foot of it through their common agent, and he directed an inquiry what sum, if any, was advanced on the security of said instrument in writing, when and by whom, and what sums, if any, for principal and interest are now due on foot thereof.

The following facts appear from the affidavits filed on each side :—

The plaintiffs and also Duke were clients of a solicitor named Harold Charles Geoghegan. In the year 1903 the plaintiffs gave Geoghegan a sum of £900 to invest for them. They never saw any security for it, but he paid them interest. They state, apparently on his information, that he invested it on a mortgage of some property belonging to a Mrs. Christian, which was subsequently paid off. I am not at all sure that this allegation would be supported by investigation. The plaintiffs made repeated applications to Geoghegan for payment of the £900, and he from time to time made appointments to meet them in reference to paying them, but he failed to keep those appointments.

In the year 1904 Harold Geoghegan got possession of the title deeds of Duke for the purpose, as he alleged, of effecting sales to tenants. In September, 1905, Geoghegan informed Duke that he was promoting a company called the Hydroscope Company—an invention for seeing clearly under water—and he induced Duke to execute three mortgages, dated 9th and 30th December, 1905, and 13th February, 1906. The moneys raised by these were to be devoted to the flotation of the company. Those mortgages are

not in question in this action, but Harold Geoghegan received the moneys paid on foot of them.

On the 13th February, 1906, Duke, at the request of Harold Geoghegan, executed several mortgages in blank with the view of raising money for his own benefit on the estates. It was stated they were six or nine in number, but this is not material. The document in question was one. There were blanks for the date and the names of the lenders and their addresses, and the sum to be lent, and rate of interest and date of repayment, and dates of payment of interest. Duke's execution of these deeds in blank was witnessed by a man named Ampleford. Like memorials for registration were also signed. In the end of March, 1906, Ampleford, by the direction of Geoghegan, filled up one of those blank deeds by inserting the names of the plaintiffs, as mortgagees, and the sum of £900 as the sum lent, and interest at the rate of £7 per cent., and he also inserted the date as 1st December, 1905.

The plaintiffs having failed to obtain payment from Geoghegan, instructed a solicitor in June, 1906, who, it is said, threatened criminal proceedings against him.

In the same month of June, 1906, defendant instituted proceedings in England against Geoghegan for an account of all moneys received by him on his behalf, and on the 3rd July, 1906, Geoghegan signed an acknowledgment of indebtedness, stating the particulars of all mortgages and notes in the schedule. The mortgage claimed by the plaintiffs is not mentioned.

Such being the relations between Duke and Geoghegan, and between the plaintiffs and Geoghegan, who was, as I have stated, pressed by them for payment, he, on the 17th July, delivered to the plaintiffs the deed bearing the date 1st December, 1905. The only consideration for this delivery, so far as appears, is the past debt of £900, for which he was being sorely pressed. No money was paid by plaintiffs to Geoghegan or Duke, nor was Duke aware of their existence as alleged mortgagees till the present proceedings were instituted. As I have said, the deed purports to bear date the 1st December, 1905, and the grant is "in consideration of £900 this day paid to the said Roger Philip Duke by the said Lizzie, Theresa, and Bridget M'Cormick, the receipt

Appeal. 1907.

M'Cormick v. Duke.

Sir Samuel Walker, C.

whereof the said Roger Philip Duke doth hereby acknowledge," and it was registered on the 17th July, 1906. That is a recital known by the plaintiffs to be false, and they knew this deed was delivered for a debt due to them by Harold Geoghegan. It was, as I infer, filled up in March by Harold Geoghegan's directions in order to have it in readiness to give to the plaintiffs to allay the pressure on himself. About the day he delivered this deed Harold Geoghegan absconded, and has not since been heard of.

It is unnecessary to express any opinion as to what the rights of the plaintiffs would have been if Geoghegan, holding this document, with all its infirmities, had borrowed the £900 from the plaintiffs on the faith of it as if for Duke. If this had been the state of facts, even though there were fraud and forgery on the part of Geoghegan as between him and Duke, and though he misappropriated the loan, there is strong ground for contending that Duke could not be heard to dispute his liability. But this case on its facts stands far apart from the considerations which would arise in such a case. Agency here there was none on the 17th July between the plaintiffs and Geoghegan, or between Duke and Geoghegan.

The document of the 1st December, 1905, was delivered to the plaintiffs for Geoghegan's debt due to them, and both the facts and the recital in the deed gave them notice that Geoghegan was doing an unauthorized and wrongful act.

I regret the result as regards these poor ladies, but I feel compelled in point of law to decide that they have no right to assert any claim on the document against Duke's estate, and as I am unable to see how any inquiry could help them, I am of opinion the appeal must be allowed.

FitzGibbon, L.J. :—

I concur. In the first place, I can find no sufficient evidence that any money was obtained from the plaintiffs, or that any pecuniary harm was done to them, by the use which was made of the paper that was so foolishly executed by the defendant. Secondly, I think that, in granting relief, there was an omission to consider that Geoghegan, in this transaction, was, to a certain extent, the agent of both parties, and, on the facts proved, I do

not think the plaintiffs can claim through the deed which it is proved that they got from Geoghegan, when in giving it he was violating his duty to the party who had entrusted him with it.

The defendant ought not to get the costs of an investigation by a competent Court of the claim to which his folly gave rise; and, as an appeal became necessary to obtain a final adjudication on the matter, I think that, without making this case a precedent, but on just grounds, having regard to the defendant's conduct, he should not get the costs here, although he has succeeded.

HOLMES, L.J.:—

The summons by which these proceedings were begun was issued to realize a mortgage debt of £900, created by deed of the 1st December, 1905; and in the affidavit of Miss M'Cormick in support of the summons there is only one paragraph calculated to suggest that the security was not given in the usual way, in consideration of a loan made at the date of the instrument. Subsequently, however, the plaintiffs and the defendant supplied further evidence, which, although somewhat wanting in details, shows clearly, when taken in connexion with the admissions of counsel, that this is not the true view of the transaction. It appears that in 1903 the plaintiffs gave, for the purpose of investment, £900 to a firm of solicitors, of which Harold Geoghegan was the most prominent, if not the only, member. Miss M'Cormick says that this sum was lent on a mortgage, or otherwise, to a Mrs. Christian, and that it was afterwards paid off. I have no doubt that she was told by Geoghegan that her money was duly invested; but, although she received from or through him interest thereon down to 30th November, 1905, she never was given any deed or other form of security, and it is certain that she and the other plaintiffs were not satisfied of its safety. In the paragraph of her first affidavit, to which I have referred, she swears that she repeatedly applied to the Geoghegan firm, who made several appointments with her, to obtain payment of the money, but put off doing so from time to time. The date of these applications is left uncertain; but the facts, which I shall state presently, leave no doubt that they were made before the plaintiffs had heard of the mortgage of the 1st December, 1905, and there-

Appeal. 1907. — M'Cormick v. Duke. — Holmes, L.J.

fore that it was not from the defendant that they were looking for payment. The cause of their thus pressing their solicitor was that they believed either that he had never invested the money, or that he had advanced it to Mrs. Christian on inadequate security. Whichever of these views be correct, their object was to obtain repayment, and not to leave the cash in the hands of Geoghegan that he might lend it to another borrower.

I shall now state the true history of the mortgage on which the plaintiffs rely. The defendant, having become entitled lands in the counties Sligo and Roscommon, had his first business connexion with the Geoghegan firm in 1904, in relation to the sale of this property to the tenants, under the provisions of the statute of the previous year. This does not seem to have led to anything; but in 1904 Geoghegan induced the defendant to assist in promoting a company, called the Hydroscope Company; and to help this undertaking the defendant, in December, 1905, mortgaged his Irish property by two deeds to secure the sums of £700 and £350. This was followed by a third mortgage of £675 for the same purpose, executed by the defendant on the 13th February, 1906. Up to this time no such document as that dated the 1st December, 1905, was in existence or in contemplation. It originated, according to the evidence of the defendant, on the day he executed the third mortgage. As he was driving with Geoghegan on that occasion past the Metropole Hotel in London, the latter stopped the cab, and got him in the hotel to attach to a document his signature, which was witnessed by Douglas Ampleford, an assistant in Geoghegan's office. The defendant swears that he did not read this paper, and is unable to state its nature; but Ampleford identifies it as being the plaintiffs' mortgage. He further says that there were blanks therein, where there now appear the date of the instrument, the names and addresses of the plaintiffs, the amount of the consideration, the rate of interest, and the dates for the repayment of the principal and of the half-yearly payment of interest. He adds that these blanks were filled up by him at the dictation of Geoghegan about the end of March, 1906, the defendant not being present.

There is only one difference between the evidence of the defendant and that of Ampleford. The former speaks of only

one document, signed by him on the 13th February, while the latter says that he then executed six or nine mortgages, all presumably with the same blanks and in the same condition as that relied on by the plaintiffs. It is to be noted that Ampleford does not say that these papers were read, or any explanation given of them, in his presence; and it is difficult to believe that any man in possession of his mental faculties would execute six or nine deeds with the intention, or in the belief, that they might afterwards, without his consent or knowledge, be converted into mortgages on his property for any sums that his solicitor might insert. I shall, however, assume that when the defendant executed the document on which the plaintiffs rely, and gave it to Geoghegan, the latter had from him authority, express or implied, to raise money by means of it to help to float the Hydroscope Company; and I also assume that if Geoghegan procured a loan on its security, the lender would not be affected by his improper or fraudulent application of the money so advanced.

It was argued, in this Court as well as before Barton, J., that the law does not permit me to make this assumption; that the filling up the blanks, even if this were within the scope of the solicitor's authority, would vitiate altogether the document as a security, and that it would have no greater validity than if the defendant's name had been forged thereto. Barton, J., refused to accept this proposition; and I agree with him. The document, when completed, after it had been executed by the plaintiff, would probably be no longer his deed. But a deed is not needed to give a good charge on lands, and therefore I am unable to accept this branch of the defendant's argument. There is, however, another point in his favour that is, I think, unanswerable. The only inference that I can draw from the evidence is, that either any authority received by Geoghegan from the plaintiffs and the defendant to lend or borrow was put an end to before the document was used by him for any purpose, or, even if such authority still continued, he neither used nor purported to use it to secure a loan. After Ampleford filled up the blanks, the document still remained in the hands of Geoghegan, and it was not delivered, nor was notice of it given to the plaintiffs, or to anyone on their behalf. It was neither stamped nor registered, and it continued

Appeal. 1907. M'CORMICK v. DUKE.

Holmes, L.J.

to be, as it was before, a worthless paper. I have no doubt that the reason for Geoghegan having it converted into what was, in appearance, a completed mortgage was that Miss M'Cormick was, to use her own words, making repeated applications to him to obtain payment of her money; and it occurred to him that this paper might be useful to stave off her importunity. But the fact that a person who has given another £900 to be invested, afterwards presses to have the money given back, is inconsistent with the continuance of the authority to invest. A similar change took place in the defendant's relations with Geoghegan. Assuming that, when he signed the paper on the 13th February, he authorized the solicitor to use it to raise money to float the Hydroscope Company, this authority also came to an end: for I find that, in June, 1906, Duke began an action against him in the English High Court for an account of the moneys received by him on behalf of the defendant, after which it would be difficult to hold that the authority to mortgage continued. Up to this time the plaintiffs had never heard of the defendant or his property, and they were becoming more and more uneasy about their money. In either June or July they employed another firm of solicitors to enforce payment of it; and although there is a dispute as to whether the criminal law was threatened, there is no doubt that great pressure was put on Geoghegan, who, on the 17th July, handed them the document filled up in March. They had it stamped and registered; but it is difficult to believe that they regarded it as being of any value. Both they and their clients knew that it was not what it purported to be—a security for the advance of £900 lent to the defendant; but that it was given to satisfy a debt due to the plaintiffs by Geoghegan himself. On the 19th July it is admitted that the latter fled the country, and at the earliest moment afterwards was adjudicated a bankrupt.

We have been pressed not to interfere with the reference to Chambers directed by Barton, J., for the purpose of ascertaining what sum, if any, was advanced by the plaintiffs on the security of the document on which they rely. I feel much sympathy with them, knowing that they have lost, if not all, at least a substantial portion of their income by their confidence in a man whose posi-

tion as a solicitor ought to have been a guarantee of his honesty; but we should only be involving them in more expense and trouble if we were to protract litigation, which, in our opinion, can have only one result. Unless we can hold that an authority to an agent to borrow money on mortgage for purposes in which the proposed mortgagor is interested includes an authority to the agent to pledge the property as a security for his own debt, notwithstanding contradictory or, at least, inconsistent recitals in the document itself, we are obliged to allow the appeal and dismiss the originating summons.

Appeal. 1907. M'CORMICK v. DUKE. Holmes, L.J.

Solicitors for the appellants: *Edwards & Good.*
Solicitors for the respondent: *Vincent & Beatty.*

R. ST. J. C.

IN THE MATTER OF THE ESTATE OF JOSEPH WILLIAMS MADDEN, OWNER AND PETITIONER; AND IN THE MATTER OF THE ESTATE OF JOHN ARTHUR MACONCHY, ALEXANDER K. M'ENTIRE, AND JOHN J. KENNY, ASSIGNEES OF JOSEPH WILLIAMS MADDEN, A BANKRUPT, DECEASED, OWNERS; THOMAS O'HARA AND OTHERS, PETITIONERS.

Ross, J. 1906. Dec. 17. *Appeal.* 1907. Jan. 18, 21.

Irish Land Act, 1903, *section 7—Offer by Land Commission to purchase—Refusal by Land Judge—Subsequent proceedings to sell by auction—Lots—Practice.*

When an order has been made by the Land Judge, refusing an offer of the Estates Commissioners, made pursuant to sect. 7 of the Irish Land Act, 1903, for the purchase of the estate for sale in the matter, and the Land Judge proceeds to put up the estate for sale by public auction, in accordance with the provisions of the said section:—

Held, by the Court of Appeal, reversing the order of Ross, J., that, in order to satisfy the test contemplated by the section, the subject-matter of the sale by public auction must be the same as that comprised in the offer made to the Land Judge, and that the lands cannot, accordingly, be put up for sale in lots.

Ross, J.
1906.

In re MADDEN'S ESTATE.

APPLICATION for directions.

The Land Judge having, at the request of the Land Commission, furnished the Commission with particulars of the estate for sale in this matter, the Estates Commissioners made an offer, dated 18th July, 1906, to purchase, for the sum of £14,596, the whole estate, in fee-simple, discharged from the claims of all persons interested in the estate, whether in respect of superior or intervening interests, or incumbrances, or otherwise, in accordance with the provisions of section 7 of the Irish Land Act, 1903. On 1st November, 1906, the Land Judge made an order declaring the offer to be insufficient, and refusing to accept same, and directing the solicitor having carriage of the sale to proceed to bring the estate to a sale by public auction in accordance with the provisions of section 7 of the Irish Land Act, 1903.

Two rentals had been settled in the matter: one of agricultural lands held in fee-simple, which were in the occupation of agricultural tenants, and the other of leasehold property, consisting of houses and premises in the town of Ballycastle, and townparks or grazing lands adjoining. As there did not appear to be any probability of any purchaser at an auction bidding for the entire estate, the petitioner having carriage brought the present motion for liberty to offer for sale by public auction, pursuant to the provisions section 7 of the Irish Land Act, 1903, the lands and premises in the rentals for sale in the matter, in such lots as the Court should direct, or for such directions as the Court should give.

Ronan, K.C., A. C. Meredith, K.C., and *De Renzy*, for the Land Commission:—

The Legislature intended that the property should be put up as a whole, in order that there should be a comparison between what the public would give and what the Estates Commissioners had offered.

Donaldson, for the petitioner having carriage:—

A sale in lots will best further the interests of the incumbrancers. It was assumed in *In re Galway's Estate* (1) that the

(1) [1906] 1 I. R. 137.

Land Judge's ordinary jurisdiction still remained to deal with the sale in such manner as not to prejudice the interests of the parties concerned : *In re Tottenham's Estate* (1).

Healy, K.C., for the tenants.

Ross, J. :—

I assume that the Legislature, when it framed section 7 of the Land Act, 1903, must have been aware of the law governing procedure in the Land Judge's Court and of the practice of the Court. They must be taken to have known that this Court is in the habit of selling in convenient lots, so as to obtain the best prices. Separate lots are also directed for other purposes, as, for instance, where different incumbrances affect different portions of the lands.

The word " estate " is not defined in the section, and is used somewhat loosely and in different meanings all through the section. The sub-section speaks of the lands being sold by public auction, but it does not use the word " estate " in reference to the sale by public auction. What is to be put up for sale is not the estate, but " the land specified therein "—that is, the land specified in the offer of the Land Commission. There is no certain way of defining what an estate is within the meaning of the section. That being so, the Legislature must have contemplated that the Land Judge should put up the property for sale in the ordinary way.

The sale could not be made subject to the Land Commission conditions, as these conditions are nearly all applicable to the case of a resale to tenants. It would not be necessary that there should be undertakings by the tenants except in the case of a resale to the tenants. There must, therefore be some qualification as regards the meaning of the word " conditions " in sub-section (3).

I cannot shut out the general principles of equity in applying any Act of Parliament. Here there are two sets of incumbrances—one on a saleable portion of the property, and the other on a somewhat unsaleable portion. The contention of the Land Commission is that I am to assist the incumbrancers on the unsaleable part by

(1) 38 Ir. L. T. R. 190.

Ross, J. 1906. — *In re* MADDEN'S ESTATE.

selling along with it the eminently saleable part—a proceeding which would be very injurious to one set of incumbrancers, as it would result in the incumbrancers on the saleable portion being wiped out. If the Legislature intended to do so extreme an act of injustice as that, they would have stated in so many words that the land was to be put up "in one lot."

The section is more or less obscure, but I think there is nothing in it to debar me from putting the estate up for sale in the ordinary way—the way best calculated to fetch the best price, and to effect justice between the sets of incumbrancers. I give the solicitor having carriage liberty to apply in Chambers for a suitable allotment of the estate. The petitioners will have their costs in the matter.

D. M. S.

Appeal. 1907. — Jan. 18, 21.

The Land Commission appealed (1).

Ronan, K.C., Meredith, K.C., and *De Renzy,* for the appellants.

Serjeant O'Connor, K.C., and *Donaldson,* for the respondents.

Healy, K.C., for the tenants.

Jan. 21.

SIR SAMUEL WALKER, C. :—

We are of opinion that this order cannot stand, and that it is contrary to the terms of the 7th section of the Act of 1903, to which we must give effect. That section may, in some particular cases, work inconvenience, but we cannot help that when the section is clear, and, in my opinion, the more you read it the clearer it appears. [His Lordship read the section, and continued.]

It follows from that section that if the Land Judge considers the offer sufficient he accepts it; if not, unless the offer is in the

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ

meantime withdrawn, he is to put up for public auction "the land specified therein," that is, in the offer, which land may, under sub-sect. 2, be the entire estate, or any part of the estate; and he shall, unless he considers it unreasonable or unjust, having regard to the interests of all parties interested in the estate, sell the same to the highest bidder. That provision as to the sale being unreasonable or unjust refers to the price which the Land Judge is offered for that which is the subject matter of the sale—namely, that which is comprised in the offer of the Land Commission; and the clear object of the sub-section is to afford a test by public auction as to whether the offer made was or was not a reasonable offer in price.

Then sub-section 6 provides that—[His Lordship read the sub-section].

That is, if the injustice or unreasonableness comes into effect, the Land Judge says that the land is not to be sold by public auction in that way; then it is freed from this provision, and the sale proceeds accordingly.

How can this section be worked out consistently with the order made by Ross, J.? According to the order made, an allotment is to be made of the lands in the rental, with a view to the sale by public auction pursuant to sect. 7, sub-sect. 3; but supposing the first lot is sold for a suitable price, what would become of the remainder, for which suitable bids might not be made? How is the test of a sale by public auction to be applied for the purpose of carrying out sub-sect. 3? Everything would be rendered abortive; the purpose of sect. 7 would not be satisfied, nor a complete sale carried out.

Under the circumstances we do not consider that the construction we are giving to the section will cause any such inconvenience as is suggested, any more than would a sale under the 40th section. The land is turned into money which will represent the land in the hands of the Land Judge, whose duty it is to distribute it according to the rights of the parties interested in it. The sale, if completed, will appear to render an apportionment necessary for the purpose of distributing that money, as to which there is a very strong section in this very Act of 1903, vesting the power of apportionment in the Land Judge.

Appeal. 1907.

In re Madden's Estate.

Sir Samuel Walker, C.

All we now do is to discharge the order of Ross, J., as not being in accordance with the duty imposed upon him under section 7; our present order really follows upon that in *Galway's Estate.* (1) The sale will proceed accordingly under the terms of section 7.

FitzGibbon, L.J. :—

In this case the proceedings have been allowed to go on under the Act of 1903, sect. 7, up to the point at which the Land Judge has received from the Land Commission an offer for the purchase of the estate at a price which he does not consider sufficient. In that state of affairs, it is his duty to comply with the mandatory provisions of sub-sect. (3), and the only question which we have to consider is, whether that which is to be put up for public auction is the same "estate," to be put up for sale in the same shape, as that which was covered by the offer, when the Land Commission was invited to purchase the fee-simple. I entertain no doubt that this must be so.

The subject matter for which the Land Commission was empowered to offer a price can not be changed before putting it up for public auction, in any circumstance affecting its saleable value, from that subject matter for which the offer (not yet withdrawn) was originally made. This is confirmed by sub-sect. (3), which speaks of "the land specified" in the offer, which must be the same as "the land comprised in the offer" in sub-sect. (2) *a*, and sub-sect. (6) suspends sect. 40 of the Act of 1896 "in the case of *that estate*, unless and until the offer is withdrawn, or *the estate* is put up for auction and *not sold.*" It is not to be sold if the Land Judge "considers it unreasonable or unjust," having regard to the interests of any party interested in the estate, to sell the same to the highest bidder." In that event, the provisions of sect. 40 will revive.

In my opinion, there is at the bottom of the trouble in this case, a failure to keep distinct the powers of the Land Judge from those of the Land Commission. But I say nothing to affect or qualify the duty of the Land Judge to see that any sale

(1) [1906] 1 I. R. 137.

which he ultimately sanctions is one that is not "unreasonable or unjust" from the point of view of a Judge of the Landed Estates Court exercising his original jurisdiction to sell the estate. It follows as a corollary that neither under the 40th section can the tenants, nor under the 7th section can the Land Commission, force the Land Judge to give them land *too cheap*.

HOLMES, L.J., concurred.

Solicitor for the Land Commission: *Wm. Alexander.*
Solicitor for the petitioners: *C. S. M'Cormick.*
Solicitor for the tenants: *J. Garvey.*

P. ST. J. C.

IN THE MATTER OF THE ESTATE OF THOMAS STAPLES IRWIN, OWNER; THE REV. ALEXANDER STAPLES IRWIN, PETITIONER.

Statute of Limitations—Mortgage—Part payment—Payment by Landed Estates Court.

T. S. I., owner as tenant for life of lands, filed a petition in the Landed Estates Court for the sale of the lands, excluding the mines and minerals. His costs in the petition matter amounted to £197 12*s.* On the 15th August, 1884, he mortgaged the lands, including the mines and minerals, to his solicitors, to secure the sum of £300, including the said sum of £197 12*s.*, which was expressly mentioned in the schedule to the mortgage. Subsequently A. S. I., the owner's brother, filed a petition as incumbrancer for the sale of the same lands, and, the two matters having been consolidated, A. S. I. obtained carriage and the lands were sold. The mortgage for £300 did not appear on the schedule of incumbrances, as the purchase-moneys were insufficient to reach it. By consent of the prior incumbrancers, and no person objecting, the sum of £197 12*s.*, being the costs of the first petition, was, in accordance with the practice of the Court, placed in priority to the incumbrances, and paid on allocation on 20th August, 1897. In 1901 A. S. I. filed a petition for the sale of the mines of coal and clay under the same lands. On the settlement of the schedule of incumbrances:—

Held, that the payment of 20th August, 1897, was a payment by the mortgagor of part of the principal money of the mortgage within the meaning of sect. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), so as to keep the mortgage debt alive.

Ross, J.
1907.

In re IRWIN'S ESTATE.

OBJECTION to schedule of incumbrances.

The case came before the Court for the final settlement of the schedule of incumbrances. It was contended on behalf of the petitioner having carriage that the mortgage, dated 15th August, 1884, appearing at No. 4 on the schedule, was statute-barred. The objection of the objector, Robert O. Longfield, submitted that the said mortgage was not statute-barred, but was kept alive by a part payment paid to the mortgagees on 20th August, 1897.

The facts sufficiently appear in the judgment.

S. L. Brown, K.C., and *Pim*, for the petitioner having carriage :—

The mortgage of 1884 is clearly barred, unless the payment of £197 12*s.* is a part payment by the mortgagor, so as to exclude the statute. The execution of the mortgage had the effect in law of extinguishing the debt due for costs, and making it a mortgage debt. Part payment must be made by a person liable to pay, and must be on foot of a larger debt than the payment, and made under circumstances that the Court can imply an existing debt and a promise to pay it : *Merritt* v. *Boswell* (1) ; *Cronin* v. *Dennehy* (2). The payment of £197 12*s.* was on foot of costs only, and not on foot of the mortgage. In no real sense was it an acknowledgment of the debt, because it was made by the Court when the mortgagor, the owner in the matter, was not interested, and was not consulted. In the Landed Estates Court the costs are the solicitor's and not the client's : *Cleary's Estate* (3). Therefore, in no way could the payment of costs to a solicitor be payment by the owner in the matter.

Oulton, K.C., and *F. N. Greer*, for the objector :—

In this Court the incumbrancer gets his costs with his demand. If the owner brings a petition for the clearing of charges not created by himself, he is brought up, and his costs are paid in priority to the incumbrances : *In re Wood's Estate* (4). The mortgagor knew that the £197 12*s.* had been included in the £300 secured

(1) [1906] 2 Ch. 359.
(2) I. R. 3 C. L. 289.
(3) 3 Ir. L. T. 181.
(4) I. R. 6 Eq. 268.

by the mortgage, and therefore the payment of £197 12*s.* was, in fact, a payment on foot of the mortgage. We had two securities for the debt—the mortgage and the right to be put on the schedule for costs. Where there are two judgments for one debt payment on foot of one of the judgments will prevent recovery on foot of the other from being barred: *In re Earl of Kingston's Estate* (1); *Seager* v. *Aston* (2). The cases on simple contract debts have no application to this case, as the statute of James 1 does not refer to part payment. The doctrine of part payment taking the case out of the statute was based on a new promise to pay the residue, implied from such part payment: Darby and Bosanquet, Statutes of Limitation, 2nd ed., p. 107; *Harlock* v. *Ashberry* (3). *Staley* v. *Barrett* (4) is undistinguishable from the present case.

S. L. Brown, K.C., in reply:—

The correspondence shows that the payment of £197 12*s.* was made with the consent of the solicitor having carriage and of the first incumbrancer, and was on foot of costs due to the solicitor, and not on foot of the mortgage.

Ross, J.:— May 17.

The facts, in so far as they are material to the only question left for decision, are as follows:—

Thomas Staples Irwin held, as tenant for life, the lands referred to in the rental, and, under another grant, the mines and minerals. In the year 1875 Thomas Staples Irwin presented a petition for the sale of the lands through this Court, through the firm of Messrs. Longfield, Davidson, & Kelly, now represented by the objector, Mr. Longfield. By an indenture of the 15th August, 1884, Thomas Staples Irwin mortgaged the lands to the firm for £300. The mortgage was made in pursuance of an arrangement. The indebtedness of Thomas Staples Irwin to the firm amounted to £381 15*s.* 1*d.* It was arranged that a promissory note for £50 should be given; that the £300 so secured should bear interest at

(1) Ir. R. 3 Eq. 485.
(2) 26 L. J. (N. S.) Ch. 809.
(3) 19 Ch. D. 539.
(4) 26 L. J. (N. S.) Ch. 321.

Ross, J. 1907.

In re Irwin's Estate.

6 per cent.; and that the remainder of the debt should be wiped out.

The original debt was for costs—partly the costs incurred in the petition matter, and partly miscellaneous costs. The costs in the petition matter amounted to £197 12*s.*, and appear as a separate item in the schedule to the mortgage. Shortly after the date of the mortgage the Rev. Alexander Staples Irwin presented a petition in this Court for the sale of the lands. This petition was consolidated with the pending proceedings, in which the owner was petitioner. The Rev. Alexander Staples Irwin obtained carriage of the consolidated matter, and finally purchased the lands for £11,200.

On the settlement of the final schedule of incumbrances it was found that the estate was insolvent, and that the mortgage of £300 could not be reached. It appeared, however, that part of the debt secured by the mortgage could be paid, namely, the taxed costs of the original petitioner—£197 12*s.* All parties were aware of the existence of the mortgage. No objection was taken by anybody to the priority of this item on the schedule. It was accordingly paid on allocation on the 20th August, 1897.

On the 9th February, 1901, the Rev. A. S. Irwin presented a petition for the sale of the mines, coal, &c., in this matter.

The only question now in the case is, whether the payment of the £197 12*s.* was a payment of part of the principal money within the meaning of section 8 of the statute of 1874. If it is not, the mortgage is barred by the statute.

A payment made by a stranger to the matter will not be effectual. It must be made by the mortgagor or his agent. This payment was made by the Court, and the effect of that is shown by the case of *Cronin* v. *Dennehy* (1).

It must be taken to have been made in the presence of the owner. The owner was aware that it was one of the items in the schedule to the mortgage. The only interested mortgagee, the Rev. Alex. Staples Irwin, was also aware of the fact, as we know by the correspondence. It was paid out of the produce of the owner's estate. Whether the particular estate was solvent or not

(1) I. R. 3 C. L. 289.

Ross, J.
1907.

In re IRWIN'S ESTATE.

is immaterial. The owner's liability was lessened, and it must be taken to be a payment by the owner to the mortgagee.

It is contended that it is not a part payment on foot of the mortgage, but a payment in complete satisfaction of the objector's claim for costs. It is quite true that the mortgage deed was not mentioned in the schedule; but then the costs claim is mentioned in the schedule to the mortgage. This item is a constituent part of the aggregate debt secured by the mortgage: *Staley* v. *Barrett* (1).

I am therefore of opinion that the payment of part of the principal under the circumstances mentioned keeps the mortgage alive in respect of the remainder of the debt, and the objection must therefore be allowed.

Solicitors for the petitioner having carriage: *Simmons & Meglaughlin.*

Solicitors for the objector: *Longfield, Kelly, & Armstrong.*

D. M. S.

IN THE MATTER OF THE ESTATE OF MARCUS B. ARMSTRONG.

Wylie, J.
1907.
May 6.

Land Purchase Acts—Practice—Irish Land Act, 1903, *sects.* 23 (12) *and* 79 *—Negotiation fee on sale to the Congested Districts Board.*

A negotiation fee is not payable out of the purchase-money of an estate sold to the Congested Districts Board under the provisions of the Irish Land Act, 1903.

QUESTION arising on the ruling of the final schedule. The vendor, who was tenant for life, had sold the estate to the Congested Districts Board, under the provisions of the Irish Land Act, 1903. The sale had been negotiated by Anthony F. Maude, the agent, and it had been agreed by the vendor that a negotiation fee should be paid to him. This had been sanctioned by the Estates Commissioners, and the trustees of the settlement con-

(1) 26 L. J. (N. S.) Ch. 321.

Wylie, J. 1907. *In re* Armstrong's Estate.

sented to the payment being made. The question now arose as to whether the negotiation fee was properly payable out of the purchase-money, and whether it should be provided for on the schedule.

Garrett W. Walker, K.C., for the vendor.

W. M. Jellett, K.C., for the trustees of the settlement and Anthony F. Maude.

Wylie, J.:—

I cannot allow the negotiation fee on the schedule. A negotiation fee may be paid out of the purchase-money, under sect. 23, sub-sect. 12, of the Irish Land Act, 1903, in the case of the sale of an estate *to persons other than the Land Commission.* "Estate" there means an estate as declared by the Estates Commissioners, and is therefore outside section 79. The sub-section could only be made applicable to a Congested Districts Board case by being incorporated with section 79. Sub-section 2 of that section provides that the purchase-money of lands vested in the Congested Districts Board shall be distributed in accordance with the provisions of Part I. of this Act with respect to the distribution of the purchase-money of land *vested in the Land Commission.* Accordingly, the provisions of section 23, sub-section 12, do not apply to a case such as this. I will pay the residue to the trustees of the settlement without prejudice to any claim which the agent may have against the funds in their hands.

Solicitors for the vendor: *Stephen Gordon & Son.*
Solicitors for the trustees of the settlement and Anthony F. Maude: *Moore, Keily, & Lloyd.*

J. E. W.

VISCOUNT MASSEREENE AND FERRARD, LANDLORD; VANCE, TENANT (1).

Appeal.
1907.
Jan. 24, 25.
Feb. 28.

Town-park—Fair rent—Land Law (Ireland) Act, 1887, *sect.* 9—*Land Law (Ireland) Act*, 1896, *sect.* 6—*User of holding.*

Prior to 1887 a holding adjoining the town of A. fulfilled the conditions of a town-park. It had been let in 1800 for ninety-one years as an ordinary agricultural or pastoral farm. Its extent was 32A. 2R. statute measure, the reserved rent being £51 11*s.* 1*d.* above taxes, equivalent to £47 11*s.* 9*d.*, English. The lessee's interest was, in 1874, purchased for £250 by V., who was a shopkeeper resident in A. There was evidence that from 1874 to 1898 the holding was used as an agricultural or pastoral farm, and the Court inferred that such had been the user from 1800. In 1898 and 1899 the grazing of the holding was let by auction, and this continued during the occupation of V.'s son (a land agent's clerk), the existing tenant up to the time of the present hearing. An originating notice to fix a fair rent was served in November, 1899:—

Held, by Sir S. Walker, C., and Holmes, L.J., *diss.* Fitz Gibbon, L.J., that the tenant was entitled to have a fair rent fixed.

Per Fitz Gibbon, L.J.: Section 9 of the Act of 1887, as amended by section 6 of the Act of 1896, requires proof of the user of the holding not only as agricultural or pastoral land, but also as an ordinary farm, and in this case the burden of proof lying on the tenant was not discharged by him.

The date of service of the originating notice is the critical time for ascertaining the character of the user; but for this purpose the Court may have regard to the user proved or inferred during the whole period of the tenancy.

The size of the holding in the present case *held* not necessarily to negative its being a town-park.

In considering evidence of accommodation value, it is not necessary that every part of the holding should bear increased value as accommodation land. It is enough if the lands included in the letting fulfil as a whole this requisite.

Macnamara v. *Macnamara* (32 L. R. Ir. 1) and *Daly* v. *Wright* (*ibid.* 9) discussed and adhered to.

The clause in section 9 of the Act of 1887, as to interference with the improvement or development of the town to which the holding belongs, and the nature of evidence rebutting such suggested interference, considered.

(1) Before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1907.

MASSEREENE, *Landlord;* VANCE, *Tenant.*

APPEAL by the tenant from an order of the Irish Land Commission, dated the 1st day of June, 1905, discharging the order of the Sub-Commission (Mr. Wade, Chairman), by which a fair rent was fixed, and dismissing the originating notice. The holding comprised 32A. 2R. 2P. statute measure, adjoining the town of Antrim, and consisted of a long narrow strip over half-a-mile in length, running to the ends of the gardens at the back of the houses in the Main Street in that town. By a lease dated the 1st day of April, 1800, the lands were demised by the Earl of Massereene to one Alexander Charters "of the town and county of Antrim, merchant," for a term of ninety-one years, from the 1st November then last past, and a life, since expired, and were therein described as "all that and those that piece or parcel of land, commonly called Begley's fields, as the same have for several years past been occupied in grazing, which have been lately surveyed by James Drennan, land surveyor, and containing 33A. 2R. 5P., English measure, adjoining the town of Antrim." The rent reserved by the lease was £51 11*s.* 1*d.* over all taxes. The lessee paid a fine of £298 5*s.* In the year 1873, the area comprised in the lease was reduced by the surrender of a small portion on which the Ulster Bank now stands, and the rent payable at the date of the originating notice was £47 11*s.* 9*d.* By an assignment, dated the 4th day of March, 1874, Wm. Vance, a grocer and general merchant, who resided and carried on business in the town of Antrim, acquired the lessee's interest in the lease of 1800 for £250. Wm. Vance remained in possession after the fall of the lease, and, on the 9th day of July, 1900, assigned the premises to his son, Ezekiel Vance, the present applicant, the considerations named being natural love and affection, and a sum of £50. The Sub-Commission fixed a fair rent of £40 on the holding, and, on the case being re-heard by the Land Commission, Mr. Justice Meredith made the order appealed from, being of opinion that the holding was a town-park, and excepted from the operation of the Land Acts.

No evidence was given before the Land Commission as to the user of the lands between 1800 and 1874, when Wm. Vance became tenant. In the latter year Wm. Vance was the tenant of seven other holdings adjacent to Antrim, comprising in all

44A. 2R. 10P., three of which were held under Lord Massereene, and he used these in connexion with each other as agricultural holdings. For a number of years Wm. Vance cropped the lands now in question—growing potatoes, turnips, oats, barley, and forced grass in rotation; part of the produce being used in his house in Antrim, and part sold. He also had four or five cows, which were grazed sometimes on these lands, and sometimes on his other holdings. In or about the year 1880, he erected on the lands a large barn, a straw-shed, and a large threshing-machine. In 1890 the tenant ceased cultivating the lands in the ordinary rotation, and for a number of years grazed it with sheep, which were sold usually in Belfast. In or about the year 1898 he commenced to let the lands by auction. In that year £56 14*s.* 3*d.* was realized by the lettings, all the occupiers save one residing outside Antrim. In 1899 £62 1*s.* 3*d.* was realized, none of the occupiers residing in Antrim. Subsequently the lands were let to a sheep-farmer, residing in Co. Down, at a rent of £60 in 1901, and £55 in 1902 and 1903. Ezekiel Vance, the present tenant, to whom the lands were assigned in 1900, resided in the town of Antrim, where he was employed as assistant to Mr. Barton, a land agent; he was also chairman of the Town Commissioners. A very full account of the history of the holding, from the lease of 1800, is given by Holmes, L.J., in his judgment, *infra*, pp. 374–6.

Healy, K.C., and *Denning* (*Whitaker, K.C.*, with them), for the appellant:—

The tenant is entitled to have a fair rent fixed. There is no evidence that the land bore an additional value as accommodation land over and above its ordinary letting value as a farm. No doubt, the assessor has found that portion does bear such an increased value, but there is no evidence to support this finding; and in any event, we contend that, in order to be excepted as a town-park, the entire holding, and not merely portion thereof, must bear such increased value. In any case, the tenant has brought himself within sect. 9 of the Act of 1887, and sect. 6 of the Act of 1896. This land was let and used as an ordinary agricultural farm; the original lease was an agricultural one; and at no period of time did the land lose its character as agricultural or pastoral. No

Appeal. 1907.

MASSEREENE, *Landlord;* VANCE, *Tenant.*

doubt, the user for a number of years was pastoral merely; but *Macnamara* v. *Macnamara* (1) is not now law, having regard to sect. 6 of the Act of 1896.

[They also cited *Killeen* v. *Lambert* (2) and *Daly* v. *Wright* (3).]

Harrison, K.C., and *Weir* (*Henry*, K.C., with them), for the respondent :—

It is not necessary to prove that every part of the holding bears an additional value as accommodation land; it is enough to prove that part does so, in which case the holding, taken as a whole, must bear such an additional value as to satisfy the condition of being a town-park. The father of the present applicant was not a farmer; he had seven other holdings, all of which he gave up without claiming or being paid compensation; and no originating notice in respect of this holding was served until service of the notice to quit. The user of the lands, looking at the entire period of the letting, as must be done, was not an agricultural user. Between the years 1890–98 they were let for grazing sheep: that is not a *bona fide* user as an ordinary farm, such as that contemplated by sect. 6 of the Act of 1906.

[They also contended that the fixing of a fair rent would interfere with the accommodation of the inhabitants of Antrim.]

Feb. 28.

SIR SAMUEL WALKER, C. :—

In this case the question which we have to consider is whether the holding is a town-park, having regard to the present legislation applicable to such a subject, and the use made of it by the tenant.

It appears that an ancestor of the present Lord Massereene, on the 1st April, 1800, demised the premises to Alexander Charters, for a term of ninety-one years, in consideration of a fine of £298 5*s.*, at a rent of £47 11*s.* 9*d.* The poor law valuation is £55. The holding contained 32A. 2R., and it is a long, narrow strip which projected into the town of Antrim. The description of the premises in the lease is "Begley's fields," apparently, from the description, grazing fields; but there is no special covenant in the lease of any kind, and unless the use of the words "Begley's fields" gives it a different character, there is nothing in my

(1) 32 L. R. Ir. 1. (2) 10 L. R. Ir. 362. (3) 32 L. R. Ir. 9.

judgment to show that it was not let as an ordinary farm. There is a covenant providing for the grinding of corn grown at a particular mill, which fortifies to some extent that view. In subsequent documents of title, the words "Begley's farm" are used instead of "Begley's fields." In 1874, the father of the present tenant bought the premises from the trustees of the former owner for a sum of £250. A small portion of the premises, consisting of about 3 roods, lying next to and in the town, was made over by Vance, after his purchase, to the Ulster Bank in this way: He made a lease to the bank for the residue of his term in consideration of the sum of £750, and the bank, on the 22nd December, 1885, obtained a lease of their plot from Lord Massereene for 500 years, surrendering their lease from Vance; and this bit thus became severed from the original holding.

The northern portion of the holding has become intersected by the railway, and south of that it is crossed by the road leading to the station.

The lease of 1800 expired in 1890.

The question in the case really turns upon the application of the 9th section of the Act of 1887, as amended by the 6th section of the Act of 1896, because it is plain the holding fulfilled all the conditions of a town-park prior to 1887, and when the Act of 1896 passed.

But the tenant can nevertheless bring the holding within the operation of the Act of 1881 if, in the opinion of the Court, it can be included without substantially interfering with the improvement or development of the town of Antrim, or the accommodation of the inhabitants thereof, and "if" (reading in the Act of 1896) "it is let and used as an ordinary agricultural or pastoral farm," subject also to the proviso in the 6th section of the Act of 1896—"this section shall not entitle a person to have a fair rent fixed who is not *bonâ fide* using the holding as an ordinary farm" —words which convey little more than was already to be found in the Act of 1887, if "pastoral" be added. The remainder of the history of the holding is that it continued a tenancy from year to year from 1890, and in 1899 a notice to quit was served, and a notice to fix a fair rent was given on the 31st October, 1899. The order of the Sub-Commission fixing a fair rent of £40 was

Appeal. 1907.

MASSEREENE, *Landlord;* VANCE, *Tenant.*

Sir Samuel Walker, C.

made on the 9th February, 1903, and that of the Head Commission discharging it on the 1st June, 1905.

Now, in the first place, I am myself of opinion that this land was, in 1800, let as an ordinary agricultural or pastoral farm. I come to that conclusion from the extent of the land, the extent of the term, the large fine paid, and the terms of the document of letting; and I do not think those considerations are outweighed by the description, "Begley's fields," afterwards called "Begley's farm." The "user" is what raises in my mind the difficulty. The evidence on this point is really not disputed, and I am satisfied that the user was continuously of an agricultural and pastoral character down to 1898, thus extending beyond the date of 1890, when I think it became a present tenancy from year to year by virtue of the Act of 1881. It is settled by the decisions of *Macnamara* v. *Macnamara* (1) and *Daly* v. *Wright* (2), that in construing this word "used," we must look to the substantial user of the lands during the whole term. The word "used" really imports this: otherwise it would follow that an agricultural or pastoral use—a wholly exceptional one at the particular critical date: say the service of the fair rent notice—would satisfy the sections. The test ought to be, What sort of a farmer has this tenant really been in substance during his term?

I think that whatever would be the user in duration to be regarded for the purposes of the 9th section of the Act of 1887 should also be applied for the purpose of construing section 6 of the Act of 1896. During the years 1898 and 1899 he cropped the lands and sold the crops by auction.

I assume—and I think it is the true construction of the sections—that it is the date of the service of the fair rent notice—in this case, 31st October, 1899—which we must have regard to, looking behind it as well as immediately at it for the purpose of ascertaining the user. The crops were sold that year—the commencement of the litigation—as well as in the year 1898. It would not, I assume, be the best class of farming to do that in those years; but I think this is too small a circumstance to outweigh the user of ninety-eight antecedent years. The words in the proviso to the 6th section of the Act of 1896—"is not *bonâ*

(1) 32 L. R. Ir. 1.

(2) *Ibid.* 9.

fide using the holding as an ordinary farm"—should, I think, be construed in the same way as the words they qualify, and not exclusively directed to the year 1899. On this particular part of the case, I cannot think that the selling of the crops during the years 1898 and 1899 is sufficient to deprive the tenant of the benefits of the Acts of 1887 and 1896, if he is otherwise entitled to them. He did not conacre the lands, nor was there any accommodation user.

Passing to another point, I think we must assume that this farm bears, as a whole, some accommodation value. The evidence before the Sub-Commission was that it bore 30 per cent. more for proximity and accommodation. Judge Meredith required his assessor to give separate items; and he reports 15 per cent. for proximity and 20 per cent. for accommodation, excluding the two fields above the railway. I do not agree with the argument of Mr. Healy, that each and every acre of land must bear accommodation value. I think that the land must be looked at as a whole; but its bearing an accommodation value does not exclude it from the fair rent provisions if the tenant brings himself within the Acts of 1887 and 1896.

There was a further contention—that founded on the 9th section of the Act of 1887—that a fair rent could not be fixed on this farm without substantially interfering with the improvement or development of Antrim or the accommodation of its inhabitants. The Judicial Commissioner was not impressed by this point, as he does not found anything upon it; and the Sub-Commission attached no weight to it: and they, having seen the place, are the most competent tribunal to form an opinion on the point. I do not propose to make any minute examination of the evidence on this part of the case; but there are some salient topics which influence me in coming to a conclusion in favour of the tenant on this particular matter. I shall notice some of them:—The population of Antrim and what it has been for more than half a century; the fact that in 1800 the landlord leased away this farm for ninety-one years; the inconsiderable extent of building done about the town, and, where made, done for a special class of residents, who are always to be found in a town like Antrim, such as the doctor, the clergyman,

Appeal. 1907.

MASSEREENE, *Landlord;* VANCE, *Tenant.*

Sir Samuel Walker, C.

and the district inspector; the prices that have been got for land let by auction, and mostly from farmers and persons not resident in Antrim itself; the extent of land left; and the fact that fair rents have been fixed on certain lands in the vicinity of Antrim, presumably as much town-parks as this.

On this part of the case I have a strong view in favour of the tenant. I cannot find any evidence of accommodation user which would not exist in the case of any farm owned by a town resident. The questions arising on this 9th section of the Act of 1887 and the 6th section of the Act of 1896 are by no means free from difficulty; but upon the whole I think the tenant is entitled to maintain the order made by the Sub-Commission, and that consequently the order of the Judicial Commissioner must be reversed, and the appeal allowed.

FITZGIBBON, L.J.:—

This case depends first, on the burden of proof, and secondly, on the sufficiency of the proof given by the party on whom that burden lies.

I believe that we agree that the conditions necessary to exclude this holding, as a town-park, from the Act of 1881, are proved, and, therefore, it rests on the tenant to bring himself back again within the Land Acts, by proof of the conditions prescribed by the Act of 1887, as amended by the Act of 1896.

One matter was mentioned, as to the distinction between the Acts of 1887 and 1896, on which I must say a word. It was suggested at the Bar that the alteration made by the Act of 1896 was for the purpose of getting rid by statute of the decisions of this Court in *Daly* v. *Wright* (1) and *Macnamara* v. *Macnamara* (2). That was not so. The Act of 1887 brought in a holding "if it is let and used as an ordinary *agricultural* farm." It was argued that the use of the word "agricultural" in that exceptional provision, having regard to the use of the words "agricultural or pastoral, or partly agricultural and partly pastoral," in other parts of the Act, showed that, to come within the exception, the letting

(1) 32 L. R. Ir. 9.

(2) *Ibid.* 1.

and user of the holding must be proved to be exclusively agricultural as distinguished from pastoral. But that was not made the foundation of the decisions in this Court, though it had been mentioned as a reason for putting a narrower construction on the excepting section in the Act of 1887 than upon the defining words of the Act of 1881.

The Act of 1896 got rid of that argument by enacting that it should be sufficient for the tenant to prove user, agricultural or pastoral, or partly agricultural and partly pastoral, and, in the result, it still remained the meaning of the Legislature that tenants of lands which would otherwise be excluded as town-parks were not to be excluded from the Land Acts if they were ordinary tenants using their holdings as ordinary farms. But the tenant, in each case, has to bear the burden of proving this. On the language of the Acts, and on the decisions, I have never regarded that condition as being satisfied by mere proof of the user of the lands: the question—"What sort of a farmer has the tenant been?"—has also to be considered. It has always seemed to me that the section implies that, to come within it, the tenant must be a man who uses his land as an ordinary farm: in other words, to save himself from exclusion, he must show that he is—with regard to the holding in question—an ordinary farmer.

Having said so much as to the law, I must say, upon the facts, that I am not satisfied that the burden of proof lying on the tenant has, in this case, been discharged by him.

I admit that, in the original letting, the place was let as an ordinary farm; the quantity of land let was, and is, so large as to give rise to considerable doubt that the holding—as a whole—was a "town-park"; but, having regard to all the circumstances, I see no reason to hold that the land called "Begley's farm," was let otherwise than as an ordinary farm. The tenancy from year to year, into which the original lease was afterwards converted, remained subject to the terms of the lease, so far as applicable.

In determining the character of the user, I entirely agree that we are to look to the user, as well as to the other circumstances of the holding, not at any particular moment, but as a whole.

This land has been in the tenancy of people who have not been ordinary farmers from the time when the original tenant became

Appeal. 1907.

MASSEREENE, *Landlord*; VANCE, *Tenant.*

Fitz Gibbon, L.J.

a townsman rather than a farmer. The land appears to have been always used for agricultural or pastoral purposes, but not in the ordinary way, nor by tenants who were ordinary farmers. Buying and selling sheep or cattle as a dealer, and using land as lairs for cattle or sheep, or for keeping sheep or cattle for the purposes of a tenant who is a dealer, or a townsman, and for whom the land bears an increased value as accommodation land, is—I say with all respect—*not* using land "as an ordinary farm."

In *Macnamara* v. *Macnamara* (1) we held, and the Act of 1896 did not touch the decision, that conacre letting, or letting for grazing, was not ordinary farming; and here Vance, a merchant in the town, was not an ordinary farmer: he was not even in *bona fide* occupation; and, having regard to all the user of this holding, I can not find that, on the whole, it has been let and used as an ordinary farm, agricultural or pastoral, or partly agricultural and partly pastoral.

On that ground, which is one of fact, and of inference of fact from evidence, I cannot agree with my colleagues, but this involves no difference between us as to the law.

I do not think that the fact of a road having been made through the land, giving frontage for some additional houses, is sufficient to exclude this holding from the Land Acts, on the ground of interference with the extension of Antrim; and on that point I do not hold that the burden of proof which lies upon the landlord has been discharged.

HOLMES, L.J.:—

The result of this appeal depends upon whether a holding adjoining the town of Antrim, of about 33 acres in area, and let at the annual rent of £47 11*s.* 9*d.*, is a town-park within the meaning of the Irish Land Acts. The same question has arisen in reference to many other holdings since the year 1870; and several points involved therein, once in controversy, have been finally settled by decisions of this Court. According to my experience, the more recent cases have turned more upon inferences of fact than upon the law applicable thereto; and I think this is

(1) 32 L. R. Ir. 1.

so in the present instance. Unfortunately, however, we cannot attach the same importance which we would otherwise do to the conclusions of tribunals that have heard the oral evidence and inspected the holding, inasmuch as the Judicial Commissioner with expert assistance has differed from three Sub-Commissioners, two of whom must be regarded as experts also.

The population of Antrim is now under 2000; and although, like most other Irish towns, this shows a considerable decrease, as compared with its population in 1841, there has been no great variation in the number of its inhabitants during the last thirty years. It is certainly large enough to have town-parks in its vicinity, as indeed was decided in the case of *Christy* v. *Gordon* (1), heard in 1878. The area of the holding is greater than is usual in the case of a town-park; but although this is a matter worthy of consideration, it would not, taken by itself, affect my judgment. I am further of opinion that the holding possesses the three statutory requisites prescribed by the Act of 1881—(*a*) it adjoins a town; (*b*) it is and has been since that year occupied by a person living in such town; and (*c*) it bears an increased value as accommodation land beyond its ordinary letting value for merely farming purposes. It is true that this increased value was found by the Judicial Commissioner (and in this I agree with him) to be confined to about two-thirds of the holding; but I also agree with him in deciding that it is not necessary to show that every part of the holding bears an increased value as accommodation land. It is enough if the lands included in the letting, taken as a whole, fulfil this requisite.

The result, then, would be, if the question for decision had arisen previous to the year 1887, the landlord ought to have succeeded; and the only point that remains for consideration is whether the holding is deprived of the character of a town-park by section 9 of the Act of 1887, as amended by section 6 of the Act of 1896. The first of these sections enacts that a holding shall not be deemed to constitute a town-park, though within the definitions of the Act of 1881, if it is let and used as an ordinary agricultural farm, and fulfils a further condition, to which I shall

(1) 13 Ir. L. T. R. 79.

Appeal. 1907.

MASSEREENE, *Landlord;* VANCE, *Tenant.*

Holmes, L.J.

presently refer. The 6th section of the Act of 1896 amends this provision by giving to the word "agricultural" therein the extended meaning of agricultural or pastoral, or partly agricultural and partly pastoral, provided that this shall not entitle a person to have a fair rent fixed who is not *bonâ fide* using the holding as an ordinary farm.

To see whether this legislation affects the case it is necessary to trace the history of the holding from the year 1800, when we first hear of it, to the present time. By an indenture of lease, dated the 1st April, 1800, the then Earl of Massereene demised to Alexander Charters, of the town of Antrim, merchant, a parcel of land, commonly called "Begley's fields," containing 32A. 2R. English measure, for a term of ninety-one years, from the 1st November, 1799, at the annual rent of £51 11*s.* 1*d.* A fine of £298 was paid by the lessee to the lessor; and the lands are described as having been for several years occupied in grazing; but the terms of the demise are those of an ordinary agricultural lease, with the usual covenant for grinding the corn grown on the premises at a specified mill, and with no restriction on assignment, subletting, or the manner in which the lands were to be enjoyed. The holding with which we are dealing in this appeal contains all the lands demised to Charters, except about 3 roods; and the rent paid, as long as we have any record of it, is the rent reserved by the lease reduced to English currency. The premises originally demised consisted of a long, narrow strip, running from the Main Street of the town for more than half a mile into the country. There seems to have been at that time no building on the lands; but afterwards a house was erected on about 3 roods adjoining the Main Street, which are not now part of the holding. The Judicial Commissioner draws from the terms of this lease an inference hostile to the contention that the premises were let as an ordinary agricultural farm. It is an example of how the same facts occasionally lead different minds to opposite inferences that I am unable to draw any other conclusion from the terms of the demise than that rejected by the present Master of the Rolls. For some reason unknown to me Lord Massereene determined to consolidate certain fields that for several years had been occupied in grazing, and over which he had complete control, into one

farm, and to put it out of the power of himself or his successors in title for a period of ninety years to use them for the accommodation of the inhabitants of Antrim. Charters might sell his interest to a stranger at any time, or employ the lands for any purpose he thought expedient. Were it not that a Judge of the experience of the Judicial Commissioner took a different view, I should not entertain the slightest doubt that the premises were let in 1800 as an ordinary agricultural farm. There is no actual evidence of how the lands were used between that date and 1874, upon the 4th March in which year the leasehold interest in all the lands originally demised by Lord Massereene, except in the 3 roods already mentioned, was assigned to William Vance, the father of the appellant. It appears from the recitals in this instrument that what had been demised to Charters had at some later date become vested in James Moore, who, by his will, dated the 11th June, 1855, bequeathed the same to his widow Grace Moore, and that, on the marriage of her daughter with John Ward, it was put in settlement by indenture, dated the 24th December, 1858. It further appears from these recitals that the trustees of this settlement, on the 10th April, 1866, demised to trustees for the Ulster Banking Company the 3 roods aforesaid, with the messuages erected thereon, for a term of twenty-five years less by three days, at the annual rent of £50; and that the premises, the subject of this sub-demise, were, if my note is accurate, surrendered to Lord Massereene on the 1st May, 1873. The object of the assignment of 1874, which was executed by the trustees of John Ward's settlement, as well as by himself and his wife, was to transfer their interest in the rest of the holding to William Vance, in consideration of the sum of £250; and from that date down to the 1st November, 1890, when the term created by the demise of 1800 expired, he occupied the holding which is the subject of this appeal under the old lease. In the assignment to Vance the premises are described as "that farm of land" and as "Begley's farm"; but although there are probably persons living in Antrim or its neighbourhood who could depose to the mode of user previous to 1874, no such evidence was given by either side; but if I am right in holding that the premises were let in 1800 as an ordinary farm, and if I find that in 1874 they were used for

Appeal. 1907.

MASSEREENE, *Landlord;* VANCE, *Tenant.*

Holmes, L.J.

this purpose, I am at liberty to draw the inference that during the intervening period the user was of the same kind.

William Vance was a grocer and seed merchant, carrying on business in Antrim, and in addition to the premises assigned to him in 1874 he held about 44 acres of land near the town. The appellant, his son, an intelligent and apparently candid man, with other witnesses, gave evidence of the user of Begley's farm from the time of its coming into the possession of William Vance. I am satisfied by this testimony that as soon as he got it he proceeded to till it in ordinary rotation, raising potatoes, turnips, oats, barley, and forced grass, and that down to the year 1880, these crops were sold by auction on foot. This is a not unusual mode of farming, and is quite inconsistent with the holding being regarded as an accommodation for his household and business. He had four or five cows—a small number to be kept upon nearly 80 acres; and while portion of their produce was used in his house, the rest was sold. In or about the year 1880 Vance built a large barn, a shed for straw, and a threshing-machine; and from that date until 1890 he gathered, threshed, and sold his grain crops in the ordinary way. I cannot find that this evidence of user given by the appellant was made the subject of cross-examination; and it seems to have been adopted by the Judicial Commissioner. I am therefore of opinion that down to the year 1890 the holding was used as an ordinary agricultural farm. It follows that if, by reason of this user, it was not excluded from the Act of 1881, section 21 of that Act applied, and on the fall of the lease in 1890, William Vance became a present ordinary tenant from year to year, with the right to have a fair rent fixed. He did not, however, after that time cultivate the holding as he had done previously. He seems to have got tired of farming; he had shortly before got rid of much of his land, and in 1890 he took up the business of an auctioneer. He then began to graze the premises with sheep; and as he continued to do so for many years, I am of opinion that he thus converted them from being an agricultural into a pastoral holding.

In *Macnamara* v. *Macnamara* (1) observations were made on the

(1) 32 L. R. Ir. 1.

use of the word "agricultural"; but the case was decided on other grounds, and any doubts caused thereby have been removed by section 6 of the Act of 1896. The effect of this provision is to place pastoral user in the same position as ordinary agricultural user was given by section 9 of the Act of 1887; and as the sheep grazing was continued to 1898, I hold that, up to that date at least, the holding was not a town-park. In that year, for some reason that does not appear, the grazing was let by auction, as it was in the following year, whereupon, on the 21st October, 1899, a notice to quit was served, followed, on the 1st November, by the originating notice in this matter. The subsequent history of the holding is that it was assigned to the present tenant by his father on the 9th July, 1900, since which the grazing was let by auction to a sheep farmer of Kilkeel each year down to the hearing before the Judicial Commissioner.

In *Daly* v. *Wright* (1) the Lord Chancellor said, in reference to the words "is let and used" in the Act of 1887, that "we are not limited to the user at any particular date, but that we must look to the substantial user during the whole term"; and in giving judgment in the present case the Judicial Commissioner said:—"The user of the holding is a user, to be regarded, not at any particular time, but throughout the currency of the letting."

Now, I am satisfied from the evidence that the land, having been let for the purposes of an ordinary agricultural farm in 1800, the substantial user from that time down to the service of the originating notice on the 1st November, 1899, was in accordance with the object of the letting. William Vance, who served the notice, had himself used it as either an agricultural or pastoral farm for twenty-five years previous to the date of such service. The Lord Chancellor, in *Daly* v. *Wright* (1), was of opinion that it must be assumed that the Legislature, in the Act of 1887, "intended to describe a character of holding which would not only have incidents already common to all town-parks, but be in its tenure and use something different from the subject-matter which is in tenure and use that townsman accommodation which even the Act of 1887 carefully preserves." These words are

(1) 32 L. R. Ir. 9.

Appeal. 1907.

MASSEREENE, *Landlord;* VANCE, *Tenant.*

Holmes, L.J.

peculiarly applicable to the use by Vance which, from first to last, has been absolutely inconsistent with "townsman accommodation." I attach no importance to the fact that, in 1898 and 1899, instead of grazing the land with his own sheep, he let the grazing. This did not alter the substantial user—it was still used as a pastoral farm, and the letting was not for townsman accommodation, as the graziers, with a solitary exception, did not reside in the town. It has been sought to attach weight to the final clause of section 6 of the Act of 1896—"provided that this section shall not entitle a person to have a fair rent fixed who is not *bonâ fide* using the holding as an ordinary farm." I agree with the observation of Mr. Justice Barton in his well-known book, that "this proviso appears to be somewhat redundant, having regard to the words of the 9th section of the Act of 1887 to the same effect." I think that its object is to emphasize the view that the user must be in good faith and not colourable or adopted with an indirect object. Moreover, I hold that at the date of the originating notice, which I take to be the critical date, there had been no substantial change of user; and, indeed, having regard to the pending litigation, I am of opinion there has been no such change subsequently.

Before concluding, I wish to say a few words upon the second condition in section 9 of the Act of 1887, namely, that the holding "may, in the opinion of the Court, be included in the operation of the Act of 1881 without substantially interfering with the improvement or development of the city or town to which it belongs or the accommodation of the inhabitants thereof." This condition has not been referred to by the Judicial Commissioner, nor in the judgment of the Sub-Commission. It may be said that as the former held that the lands were not let to be used as an ordinary farm, it was unnecessary for him to consider this matter; but it must have been held by the Sub-Commission that the condition was fulfilled: and as two members of that tribunal had the advantage of a personal inspection of the lands and the locality, their decision is entitled to great weight. It is also, in my opinion, in accordance with the evidence. In 1800, when the town of Antrim was, I should think, in about the same state of development as it is at present, Lord Massereene, who was more

interested in its prosperity than anyone else, let this holding for the term of ninety years, to be used as an ordinary farm. No one has ventured to suggest that if this letting had not been made, the town would be more populous or flourishing than it is now. The evidence has failed to show that these lands are either required or suited for building sites. Since the surrender of the 3 roods the holding is cut off from the Main street of the town, and an inconvenient approach, with the fact that a railway line intersects it, is against its being used for suburban residences. The strongest evidence that the premises are not needed for the accommodation of the town inhabitants is to be found in the fact that since the grazing was let by auction it has not been taken by townspeople, but by outsiders who have paid what seems to me to be comparatively small sums therefor. I did not understand that this condition, which, as I have said, was not mentioned by the Sub-Commission or the Judicial Commissioner, was relied on in the argument in this Court; and I have only referred to it to show that, in allowing the appeal, I have not overlooked it.

Solicitors for the tenant: *O'Rorke, M'Donald, and Tweed.*
Solicitor for the landlord: *Wellington Young.*

R. ST. J. C.

Ross, J.
1906.

Dec. 18.
1907.
May 13, 17.

Appeal.
June 21, 24, 27.

In the MATTER of the ESTATE of EBENEZER HENRY ROWE.

Landed Estates Court—Sale of part of lands comprised in absolute order—Conveyance—Lands sold subject to a jointure—Indemnified against jointure by unsold lands—Incumbrances prior to jointure—Rights of jointress.

In 1879 and 1880 an estate was put up for sale in fifty-one lots, and twenty-nine lots were sold, and the proceeds of the sale applied, *pro tanto*, to pay off the incumbrances. Among the charges affecting the lands was a jointure of £300 a year, created by indenture dated the 16th August, 1876. The conveyances were executed to the purchasers, subject to the jointure, but indemnified against the jointure by lots 47 to 51, which were still unsold. In 1906 it was agreed to sell the rest of the lands remaining unsold to the tenants under the Land Purchase Acts. The jointure having fallen into arrear, the jointress, in February, 1907, brought an action in the Chancery Division against the purchasers of the lands sold in 1880, to raise the amount of her jointure. The purchasers applied to the Land Judge for an order that the receiver should pay the rents of lots 47 to 51 to the jointress on account of the arrears of her jointure in indemnification of the purchasers. This was opposed by mortgagees, whose incumbrances were prior in date to the jointure:—

Held, by Ross, J., that the purchasers, by their conveyances, obtained a charge by way of indemnity on lots 47 to 51 superior to, and in priority of, the incumbrances.

Held, by the Court of Appeal (varying the decision of Ross, J.), that the jointress could not recover for her own use out of any part of the estate any money on foot of her jointure until the incumbrances on the schedule of incumbrances prior to the jointure had been paid.

The lands subject to the order for sale in the matter were divided into fifty-one lots, out of which lots 1 to 46 were, in 1879-1880, put up for sale by the Court by auction under conditions of sale, and twenty-nine lots were sold to purchasers. The lands were subject to a contingent jointure annuity of £300, which was puisne to the incumbrances affecting the lands. Condition 13 of the conditions of sale was as follows:—"The several lots of this estate are subject to a contingent jointure annuity of £300, to be payable to the wife of the owner in this matter, during her life, in the event of her surviving

him, created by an indenture dated the 16th August, 1876, made between Ebenezer Rowe, first part (and others). Each of the lots 1 to 46, inclusive, in the rental will be sold subject to the entire of said annuity of £300, but indemnified against payment of any part of same by lots 47 to 51, which will be sold by the Court primarily liable to bear the same in the proportion following, viz., lot 47 will be primarily liable to bear £41 7*s.* 5*d.*; lot 48, £43 11*s.* 9*d.*; lot 49, £32 4*s.* 3*d.*; lot 50, £69 14*s.* 2*d.*; lot 51, £113 2*s.* 5*d.*; and each of said last-mentioned lots will be sold subject, in conjunction with all the other lots in the rental, to the entire of said annuity, but indemnified by the others of said last-mentioned lots in respect of the sum above set opposite each of such lots respectively, and liable to bear the sum set opposite such lot itself in indemnification of all the other lands liable thereto."

The Land Judge's conveyances conveyed the lands to the purchasers, subject in conjunction with other premises to the said jointure annuity of £300, "but indemnified against the annual sum of £41 7*s.* 5*d.*, part of the said rentcharge, and all costs and expenses occasioned by the non-payment of such part, by the said part of the lands of Ballyminaun . . . which has been ordered to be sold by the said Land Judges subject thereto, and indemnified against the annual sum of £43 11*s.* 9*d.*, other part of the said rentcharge, . . . by the said lands of Jonastown . . . which have been ordered to be sold by the said Land Judges subject thereto, and indemnified against the annual sum of £32 4*s.* 3*d.*, other part of said rentcharge . . . by the said lands of Grageen . . . which have been ordered to be sold by the said Land Judges subject thereto, and indemnified against the annual sum of £69 14*s.* 2*d.*, other part of the said rentcharge, . . . by the said lands of Hilltown, . . . which have been ordered to be sold by said Land Judges subject thereto, and indemnified against the annual sum of £113 2*s.* 5*d.*, other part and residue of the said rentcharge, by the said part of the lands of Grahormick . . . which has been ordered to be sold by the said Land Judges subject thereto."

The remaining portion of the estate had not been sold by the Land Judge, as intended at the date of the sale of the twenty-nine lots sold in 1880, but were in process of sale to

Ross, J. 1906.

In re Rowe's Estate.

the tenants under the Land Act, 1903, at a price of £47,000. The incumbrances upon the lots remaining unsold, including lots 47 to 51, and claiming to be in priority to the jointure annuity of £300, amounted to £58,880.

The owner and petitioner applied for an order—(1) that condition No. 13 of the conditions of sale appearing in the printed rental for sale in the matter be rescinded; (2) that Mrs. Annette Rowe do execute such deed of release or other assurance as might be necessary for releasing the sold and unsold lands comprising the estate from her jointure rentcharge of £300 per annum created by the indenture dated the 16th August, 1876; (3) that a sum might be fixed as compensation, payable to the said Mrs. Annette Rowe for her executing such deed of release, and that the same be paid to her out of the funds standing to the credit of the matter.

S. L. Brown, K.C., for the owner and petitioner.

D. F. Browne, K.C., for the purchasers :—

The purchasers bought under the conditions in the rental which was settled by the Court. The settlement of the rental was a judicial act; and all the incumbrancers, as well as the purchasers, are bound by the conditions in the rental. The 13th condition, on the faith of which the purchasers bought, provides that they shall be indemnified by lots 46 to 51 against the then contingent jointure, and that these lots will be sold by the Court primarily liable to pay the same in the proportions therein mentioned. The purchasers are entitled to be protected to the full extent to which protection can be given : *Casamajor* v. *Strode* (1); *Hatton* v. *Waddy* (2). There is nothing in the condition of sale to prejudice the indemnity. The purchasers had no notice of any incumbrances affecting the indemnifying lots. The Landed Estates Court conveyances gave effect to the conditions of sale by creating five annuities or rentcharges, charged respectively on each of the indemnifying lots, for the purpose of indemnifying each purchaser against the jointure. These indemnifying annuities are not, in the conveyances, expressed to be subject

(1) 2 Swanst. 347.

(2) 2 Jon. 541.

to any incumbrances, and, therefore, under sect. 61 of the Landed Estates Court Act, 21 & 22 Vict. c. 72, the purchasers are entitled to the benefit of these annuities in priority to, and unprejudiced of, the incumbrances affecting the indemnifying lots: *Rorke* v. *Errington* (1). The incumbrancers must be taken to have consented to the form in which the rental was settled and in which the conveyances were executed: sect. 85 of the Landed Estates Court Act. The purchase-money of the indemnified lots went to pay off incumbrances prior to the present incumbrances. The present incumbrancers should not be permitted to rely on their priority to the jointure in order to defeat the indemnity.

A. C. Meredith, K.C., and *John Leech*, for the trustee for the jointress:—

The 13th condition of sale contemplates a sale of both sets of lots, and a clearing off of all the charges leaving the jointure alone affecting the lands.

Crozier, for the incumbrancers on lots 47 to 51:—

The payments made to incumbrancers in part payment of their incumbrances out of the proceeds of the sale of lots 1 to 46, cannot affect their right to the payment of the balance due to them: sect. 69 of the Landed Estates Court Act.

Ross, J.:—

In this case, so far as the notice of motion is concerned, it is impossible for me to do what I am asked. In the first place, I am asked to rescind a condition of sale on which an actual sale took place years ago, which is absurd. In the second place, I am asked to make an order that Mrs. Annette Letitia Elizabeth Rowe do execute such deed of release, or other assurance, as may be necessary for releasing the sold and unsold lands comprising the estate from her jointure rentcharge of £300 per annum, created by the indenture of 16th August, 1876. I have no power to make such an order. Thirdly, that a sum be fixed as compensation for the said Annette L. E. Rowe for her executing such

(1) 7 H. L. Cas. 617.

Ross, J. 1906.

In re Rowe's Estate.

deed of release, and that the same be paid to her out of the funds standing to the credit of the matter. This is quite out of the question.

As, however, the whole matter has been brought before me, I may as well give the parties the benefit of my view. In 1879 arrangements had to be made for the sale of the estate, which was subject to a contingent jointure annuity of £300. According to the practice of the Court, portion was sold subject to the entire jointure, but indemnified against the same by another portion. According to condition 13 of the conditions of sale it was declared that each of the lots 1 to 46 was now to be sold subject to the annuity of £300, but indemnified against the same by lots 47 to 51, which, the condition states, "will be sold by the Court primarily liable to bear the same."

There is a rentcharge on those indemnifying lots. The purchaser came to buy the indemnified portion. What was he led to believe? That he would have an indemnity against the other lots. Also, that those lots were to be actually sold free from existing incumbrances. How can the incumbrancers be heard to say that those incumbrances are still on the lands? They might have asked that the lands should be sold discharged from the indemnity. They allowed that 13th condition to remain.

The purchaser had no means of knowing that there were incumbrances on the lots. He completed his purchase believing that he got an indemnity superior to all other charges. That being so, these unpaid incumbrancers, claiming to be in priority to Mrs. Rowe, who were parties to the sale, and who could have objected to the conditions of sale, cannot be permitted to set up their incumbrances in priority to, and to the detriment of, the purchasers, who obtained conveyances from the Court in accordance with the conditions of sale. There will, therefore, be no rule on the motion.

D. M. S.

Rose, J.
1907.

In re ROWE'S ESTATE.

May 13.

On the 17th February, 1907, a writ on behalf of Mrs. Rowe was served on the purchasers of the lands sold in 1879–1880, claiming that the rentcharge of £300 should be declared well charged on the several lands and premises which constituted the lands sold to the said purchasers, and to pay the arrears thereof. The purchasers now applied for an order that Thomas F. Crozier, who had been authorized by the Court to collect the rents, or interest in lieu of rents, payable by the tenants of lots 47 to 51, should pay, and apply, the said rent and interest to Mrs. Annette Rowe on account of her said jointure and arrears in indemnification of the applicants.

On the schedule of incumbrances Mrs. Bolton and Mrs. Scott were returned at Nos. 21 to 26 as mortgagees for £20,000, upon which there was due £11,000 for interest. The deed creating Mrs. Rowe's jointure was returned on the schedule of incumbrances at No. 27e.

D. F. Browne, K.C., for the applicants :—

The annuitant having proceeded against the purchasers, it is now necessary for them to enforce their indemnity against lots 47 to 51. The present application is a necessary corollary to the order of 18th December, 1906. [He repeated his argument of 18th December, 1906.]

W. M. Jellett, K.C., for the incumbrancers, claiming in priority to the annuitant :—

Our charges are at Nos. 21 to 26 on the schedule of incumbrances. The jointure is at No. 27. It is argued that the effect of the conveyance to the purchasers is not only to give them an indemnity, but also to alter the priority of the chargeants. Condition 13 of the conditions of sale does not alter the priorities, but says that, as between lots A and lots B, B is to pay the jointure annuity. There is nothing in the conditions to say that the purchaser is not to take his indemnity subject to the incumbrances being in front of the annuity. The Court is bound to pay according to the priorities on the schedule. All you find in the conveyances and condition of sale is an indemnity as between A and B. At the furthest the indemnity arises only in the event

Ross, J. 1907.

In re Rowe's Estate.

of the sale of 47 to 51, and not until then. On the sale the incumbrancers are paid out of the proceeds, and the indemnity only becomes operative at a time when the incumbrancers have ceased to have any interest in the land. Our incumbrances are marked "allow" at 21 to 26 on the final schedule of incumbrances. The jointure is marked "allow" at 27e.

[Ross, J.: An annuity is not an incumbrance within the meaning of the Landed Estates Court Act, though arrears of an annuity are. The annuity ought not to have appeared on the final schedule. The priority of the annuity was not ascertained, as the annuity was not an incumbrance at all.]

John Leech (with him *A. C. Meredith, K.C.*), for the annuitant.

D. F. Browne, K.C., in reply:—

The matter is concluded by the order of 18th December, 1906.

May 17. Ross, J.:—

This estate is to be considered as in two divisions, namely, lots 1 to 46 in the rental, which I will call division A, and lots 47 to 51, which I will call division B. Both A and B were subject to common incumbrances, and also to an annuity of £300 per annum in favour of Mrs. Annette Rowe contingent on the event of her surviving her husband—which event has occurred.

The incumbrances on both divisions were in priority to the annuity. Unless it was certain that all the incumbrances could be paid off, the incumbrancers should have applied to the Court, and the Court should have made an order that the lands should be sold discharged from the annuity.

This was not done, and hence the present confusion. Instead of that it was provided by the 13th condition of sale that both A and B should be sold subject to the annuity, that A should be indemnified by B, and that different lots comprising B were to bear certain fixed portions of the annuity.

A considerable number of the lots comprising A have been sold to the present applicants. The purchasers received Land

Judge's conveyances in which the lands were conveyed to them subject to the jointure, but indemnified by the several lots of division B which it is stated have been ordered to be sold.

The purchasers' money had been applied in payment of incumbrances prior to the incumbrances now represented before me, and there is a distinct assurance conveyed to them that they are to have division B as indemnifying lands. They are assured that division B was to be sold for the discharge of incumbrances, and hence they looked on B freed from incumbrances as their indemnifying lands.

The Court must keep faith with these purchasers, no matter who suffers. Their indemnity cannot properly be construed as subject to incumbrances prior to the annuity, which would make their indemnity an illusion. On the construction of this conveyance they got an immediate right of indemnity, not a right postponed till the sale of division B.

The jointress has now sued these purchasers in respect of the arrears of her annuity. They have no answer to her action. They in turn apply to me to indemnify them out of division B, pursuant to the terms of their conveyance. Is it any answer to say that there are incumbrances prior to the annuity on division B?

I decided on a former application that the rights of these incumbrancers could not prevail against the indemnified purchasers. I have reconsidered the matter now, and am clearly of opinion that the former decision was right. To give effect to that decision I am bound at once to close on the rents and profits of division B, and apply them in the relief of the indemnified purchasers.

Solicitors for the owner and petitioner, and for the incumbrancers: *T. F. Crozier & Son.*

Solicitors for the purchasers: *P. J. O'Flaherty & Son.*

Solicitor for the jointress: *Clifford Lloyd.*

D. M. S.

Appeal. 1907.

In re Rowe's Estate.

June 21, 24, 27.

Mrs. Bolton and Mrs. Scott appealed (1).

Jellett, K.C., and *W. Crozier*, for the appellants.

Matheson, K.C., and *D. F. Browne, K.C.*, for the respondents.

John Leech held a watching brief for Mrs. Rowe, the jointress.

June 27.

Sir Samuel Walker, C. :—

I have more than once, during the arguments, expressed my opinion as to the rights of the jointress, and those claiming by reason of the indemnity contained in the purchase deeds, and my views are embodied in the order of the Court which I shall state, and the reasons in support of which will be more fully expressed by Lord Justice FitzGibbon. That order is :—

> "The Court being of opinion that no money will be payable in respect of the said jointure or annuity, or any indemnity provided in respect thereof, out of any of the lands subject to the said jointure or annuity, until it is seen by the result of the sale of the estate in this matter what moneys, if any, are properly applicable to meet the said jointure or annuity and any arrears thereof, after providing for prior incumbrances : It is ordered that the said order of the Land Judge, dated the 18th day of December, 1906, do stand discharged, save so far as the same made no rule on the motion, and awarded the costs therein mentioned; and it is ordered that the said order of the Land Judge, dated the 17th day of May, 1907, do stand discharged; but it is ordered that Thomas F. Crozier, who has been authorized by the Land Judge to collect the rents and profits, or interest in lieu of rents payable out of the said estate, do keep separate accounts of the rents and profits of the said indemnifying lots, Nos. 47 to 51, and of the application thereof in the order adopted by him heretofore of such rents and profits, or in such other order as may hereafter be adopted : And it is ordered that all parties be at liberty to apply to the Land Judge as they may be advised in respect of the said rents and profits, and also in respect of the moneys produced by the sales upon or after the allocation thereof."

Among the parties who appeared, as stated in the order, was—

(1) In the Court of Appeal, before Sir Samuel Walker, C., and FitzGibbon and Holmes, L.JJ.

"Mr. Leech, of counsel appearing, instructed by Clifford Lloyd, solicitor for William T. Clogton Wade, trustee, deceased, on whom the notice of appeal had been served, and who had appeared in the Court below, and was instructed in this Court, for the said Mrs. Annette Letitia E. Rowe."

Fitz Gibbon, L.J. :—

I am afraid that there is some misunderstanding as to the principle on which the Lord Chancellor and I decide this case. I do not agree with Mr. Jellett that the only question which was before the Court below was that of the priority of his client's incumbrance as against the jointure. When that question was raised, it became necessary to consider the position of the purchasers of the indemnified lots which had been sold, and for that purpose notice was served on them. These purchasers had been total strangers to the proceedings from the time when the conveyances to them were executed; they must have been brought in for some purpose, and, when brought in, they served a notice endeavouring to protect themselves by enforcing the indemnity which their conveyances gave them. I hold that on that notice the Court became bound to consider, and to decide, whether, and how far, the indemnity which its conveyance had given was still available; and I further hold that the Land Judge's Court, which gave that indemnity in the exercise of its statutory jurisdiction, was bound to give effect to it. I hold it impossible that the jointress can recover for her own use, out of any part of the estate, any money on foot of her jointure, unless or until all incumbrances prior to the jointure have been paid. I understand that we are all agreed that, on the most important point, of paying money to the jointress out of the rents and profits of the estate while the prior mortgagees are unpaid, the judgment of Mr. Justice Ross cannot be sustained. The difficulty has arisen because by irrevocable Parliamentary conveyance, made at a time when no deficiency was apprehended, certain lots have been declared to be subject to the puisne jointure, while indemnified against it by certain other lots which have not yet been sold. That was done in exercise of the jurisdiction, which the Court unquestionably had, to sell lands subject to any particular incumbrance rather than pay it off, with the object of obtaining a better

Appeal. 1907.

In re ROWE'S ESTATE.

Fitz Gibbon, L.J

price for all parties concerned. But this could only be done on the assumption that the price received would be enough, and should be applied, to pay off all incumbrances prior to the outstanding jointure. The ground of our decision will be made clear by considering what would have happened if one or more of the indemnifying lots had been sold. The rights of the purchasers, to whom indemnified lots have been conveyed with Parliamentary title, cannot depend in any way upon the accident that the indemnifying lands have not been sold; those lands are still subject to the jurisdiction of the Court; and the Court is still bound to give effect to its conveyances, by indemnifying the purchasers of the other lands to the last penny that the unsold lands produce, or are worth. Let us suppose that one part of the estate had been sold—as it has been—with a right of indemnity against another part, and that this other part had been sold subject to the primary liability for the jointure, and that the jointure was at the time of sale an existing incumbrance; is it not obvious that the purchaser of the indemnifying lot would not have paid the full value of the land he bought? He would only have paid that value *minus* the value of the jointure. There would not have been realized by the sale so much of the value of the estate as would be equivalent to the sum payable on foot of the jointure which was still charged upon it. If, in that state of affairs, the jointress, as she would have had the right to do, had instituted a suit, not against the indemnified lot, but against the indemnifying lot, what would have been the position of the prior incumbrancer, if the estate had proved deficient? His incumbrance could not be directly realized, out of either the indemnifying or the indemnified lot, nor could it be set up against any purchaser from the Court, because the Court would have sold the property discharged of all incumbrances except the jointure; though, by selling subject to the jointure, it had, in effect, left a part of the estate still unsold, which ought to have been made available for the discharge of the prior incumbrance. It seems clear to me that the purchaser of the indemnifying lot would have been obliged to pay the jointure, as his conveyance bound him to do, but that the money could not go to the jointress until the prior incumbrancer was paid, and that a Court of Equity would have had to allow that incumbrancer to

stand in the shoes of the jointress against the lands, and to receive all money which would be payable by the purchasers on account of the jointure. In that state of affairs, it would be necessary to take separate accounts of the rents and profits and produce of the indemnifying lots, for the purpose of ascertaining whether they were sufficient to discharge the jointure. If so, the indemnified lots would be safe. If not, they would have to pay the deficiency only.

What difference can it make that no lot has been sold primarily charged with the jointure, and that the original design of indemnifying the existing purchasers by selling other lots subject primarily to the jointure, cannot now be carried out, as there has been a sale of the fee to the tenants under the Act of 1903? The motion which was brought before the Land Judge proposed to discharge the condition of sale as to the indemnity. But it could not be discharged so far as it affects the lands already sold, nor could it be so dealt with as to destroy the protection which it gave to the purchasers of the indemnified lots. On the other hand, the indemnity, in the shape originally intended, cannot be given, because the indemnifying lands have been sold under the Land Purchase Acts. But the produce of those lands, and the purchase-money of the fee-simple of them, remain bound to indemnify the purchasers.

It seems to me to be an utter mistake to say that the prior incumbrancers who are unpaid have not now every defence against the claim of the jointress which they would have had if the indemnifying lots had been sold primarily subject to it. It was said that the Court cannot be made a defendant; it is every day's practice to obtain leave from the Court to sue parties whom it represents; and it is the duty of the Court which has the control of the estate to apply the income and capital of it, so as to give effect to the Parliamentary title to indemnity, which was conferred by its own conveyance.

Therefore, from the moment when we came to the conclusion that the prior incumbrancer is entitled to be paid before the puisne jointress can get anything out of the estate, it became *a fortiori* the right of the purchasers under the conveyances from the Court to be indemnified against the jointure to the last penny of what is still under the control of the Court, viz. the

Appeal. 1907.

In re Rowe's Estate.

Fitz Gibbon, L.J.

indemnifying lands—both capital and interest, rents and profits, and produce of sale.

If it was perfectly certain that the proceeds of the estate can never reach the jointure, we could make a final order now; but at present I am afraid that we can only declare that no money can be paid to the jointress, or recovered by her out of any lands charged with her jointure, whether sold or unsold, until the prior mortgages have been satisfied, and that nothing can be recovered out of the indemnified lots sold, until the last farthing of the capital and income of the indemnifying lands has been exhausted.

Lastly, I cannot think it consistent with the duty of the Court to leave the purchasers, whom it brought before it, unprotected against the proceeding which has been instituted by the jointress, who appeared before the Land Judge, but was not then heard, because her interest was represented by the trustee of the term on which her jointure was charged. That trustee has, we are informed, since died; but the same counsel who appeared for him in the Court below, has appeared here "as holding a watching brief" for the jointress, whose rights, as against the purchasers and the prior incumbrancers, our order will declare.

Holmes, L.J.:—

The only question raised by the appellants is whether these mortgages were charges on the lands mentioned in the orders appealed from in priority to Mrs. Rowe's rentcharge. We are, I understand, of opinion that the mortgages are entitled to such priority; and as the orders under review deprive them of, or at least interfere with, their priority, the plain course for this Court would seem to me to make a declaration to this effect, and discharge the orders.

My objection to the order which my colleagues propose to make is, if I may be permitted to say so, that I do not understand its effect, or what is intended by it; and as other minds may possibly feel the same difficulty, compromise is not unlikely to be the result.

Solicitors for the appellants: *T. F. Crozier & Son.*

Solicitors for the respondents: *P. J. O'Flaherty & Son.*

R. D. M.

IN RE MAGUIRE AND M'CLELLAND'S CONTRACT (1).

Appeal.
1907.
June 10.

Possession—Guardian—Bailiff for infants—Marriage—Change of possession—Evidence of—Statute of Limitations.

P. C., the owner of a farm held under a yearly tenancy, died intestate in 1864, leaving a widow and four children, minors, in possession. In 1866 the widow married T. M., who was accepted as tenant of the farm by the landlord. No administration was ever taken out to P. C. All of the children of P. C. left the farm prior to 1883; none of them ever returned, or asserted a claim to a share in P. C.'s assets, and no acknowledgment of title was ever made to any of them from the time they left. T. M. died in 1901, having bequeathed the farm to his widow for life, and after her death to his son, the vendor. In 1902 the widow assigned the farm to the vendor freed from her life estate, and in 1907 the vendor entered into a contract for sale of the farm to the purchaser, who required the interests of the children of P. C. to be accounted for. This the vendor refused to do:—

Held, on the hearing of a vendor and purchaser's summons, that although the widow of P. C. and subsequently T. M. entered into possession of the farm, as to two-thirds thereof, as bailiffs for the minor children, their position as such was changed by the departure of the children without making any claims to their shares; that the Statute of Limitations began to run against each child who left the farm on his or her attaining twenty-one years of age; and that, on proof that no claim had ever been made by, or acknowledgment given to, any of the children, a good title would be shown.

THIS was an appeal from an order of His Honor the Master of the Rolls, dated 19th April, 1907, whereby, on the hearing of a summons under the Vendor and Purchaser Act, 1870, it was declared that the objections of the purchaser to the title had not been sufficiently answered, and that a good title to the lands sold had not been shown.

The following statement of the facts relating to the title is taken from the affidavits read on the hearing of the appeal:—

From the year 1855 to the year 1864 one Patrick Cosgrove was in possession of a farm of land situate in the barony of

(1) Before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1907.

In re MAGUIRE AND M'CLELLAND'S CONTRACT.

Magherastephana and county of Fermanagh, which he held under a yearly tenancy, on the estate of the Earl of Erne, on which estate the Ulster Custom existed. The said Patrick Cosgrove died intestate in the year 1864, leaving him surviving his widow, Sarah Cosgrove, and five children, namely, John (his son by a former marriage), and four children of his marriage with the said Sarah Cosgrove—James, Hugh, Henry, and Catherine—all the said children of the second marriage being minors at the date of their father's death. On the death of Patrick Cosgrove in 1864 his widow remained in occupation of the farm with her minor children (John Cosgrove, who was then of age, having emigrated to America prior to his father's death), and, in the year 1866, the widow married one Thomas Maguire, with whom she remained in occupation of the farm until the death of Thomas Maguire in 1901.

James Cosgrove emigrated to America in 1872, Hugh in 1876, and Henry in 1882; and Catherine Cosgrove entered a convent in 1882. None of the said children had ever returned to the farm, or asserted a claim to a share in their father's assets, and no administration to the father's estate was ever taken out.

Thomas Maguire, who was accepted as tenant of the farm in 1869 (when his name was inserted as tenant in the rental of the Erne estate), by his will, dated the 11th September, 1901, bequeathed the farm to his wife, the said Sarah Cosgrove, for her life, and after her death to his son, John Thomas Maguire, to whom probate of the will was duly granted as executor. Sarah Cosgrove remained in possession of the farm to the 28th March, 1902, when, by an indenture of that date, she assigned the farm to her son John Thomas Maguire, freed and discharged from her life estate therein.

John Thomas Maguire put up the farm for sale by public auction on the 25th January, 1907, when the present respondent, Samuel M'Clelland, was declared the purchaser at the price of £530, and a memorandum confirming the sale was duly signed by the vendor and purchaser.

The conditions of sale provided, *inter alia*, that the title to the farm should commence with a letter from the agent of the property, certifying that Thomas Maguire was tenant in 1886, and the abstract of title furnished to the purchaser commenced with

the tenancy of Thomas Maguire, as provided for, and set out his will and probate thereof, and the assignment of the 28th March, 1902, to the vendor, as above mentioned. In answer to certain requisitions made on behalf of the purchaser, it appeared that no administration was ever taken out to the estate of Patrick Cosgrove, and that no assignment had ever been made to Thomas Maguire: whereupon the following further requisition was made on behalf of the purchaser:—"Assuming that Patrick Cosgrove died intestate, his widow remained in possession upon his death under the title acquired by his intestacy on behalf of herself and the minor, John Cosgrove, the son of Patrick, and in 1886 Thomas Maguire and his wife were trustees for John as to two-thirds of the farm. John Cosgrove must, therefore, join in the assignment to the purchaser." To this the answer was given—"John Cosgrove is now aged about sixty-three years of age, and is resident in U. S. A., and has not been in this country since. Vendor's solicitor fails to see that he has any claim, and refuses to ask him to sign the assignment." The following further requisition was then made on behalf of the purchaser:—"The purchaser has now ascertained that at the date of Patrick Cosgrove's death he also left four minor children, who continued to reside with their mother on this farm. The interests of these children must be also accounted for, as their mother became a trustee for them. The purchaser insists that John must join in the assignment." To this the answer was—"Vendor refuses to comply with this requisition. Vendor's father was in possession for over twenty years, and the four minors are out of possession over twenty-five years, so their claim, if any, is statute-barred. Purchaser's solicitor will note that Thomas Maguire was accepted by the landlord as tenant prior to 1870." On receipt of this answer the purchaser's solicitor wrote, refusing to accept the title unless the interests of the children of Patrick Cosgrove were accounted for, and requiring a return of the purchaser's deposit, whereupon the present summons was instituted by the vendor.

The following judgment was delivered on the 19th April, 1907, by His Honor the Master of the Rolls (1):—

(1) Reported by Mr. Lawson.

Appeal. 1907.

In re MAGUIRE AND M'CLELLAND'S CONTRACT.

I cannot hold that a purchaser is bound to purchase a serious lawsuit, or a series of lawsuits. On the admitted facts of the case a most serious question arises as to the vendor's title. No purchaser would be safe on the facts disclosed in accepting an assignment from John T. Maguire, and completing the agreement for sale and purchase under the Act of 1903, referred to in the conditions of sale. Whether the purchaser bought from the landlord or not, he would be in the position of a possible defendant in an action, or series of actions; for, if the holding vested in him under the Land Purchase Acts, the interests of the children of the original tenant, Patrick Cosgrove, if they are in existence, would be grafted upon the fee-simple acquired by the purchaser under the Land Purchase Acts. It is demonstrated that Mrs. Cosgrove, the widow of Patrick Cosgrove, entered into or continued in possession as trustee for her minor children. It was the possession of the family, not the possession of the widow. That was the decision of the Lord Chief Baron in *Graham* v. *Chambers* (1), founded on a long line of authority. Mr. Maxwell distinguished that case on the ground that there administration to the intestate was taken out by the widow. In my opinion, that circumstance does not prevent the application of the principle to the facts of the present case. Whether the widow was a trustee clothed with representative capacity or not, trustee she was for the family, and trustee she remained until her death, as the case of *Tinker* v. *Rodwell* (2) shows was a necessary consequence of her acts. I am not deciding that Mr. Maxwell's client has no title to the premises. I wish that to be clearly understood. What I am deciding is that from the purchaser's point of view the case is presented to him as one in which he must take the title without explanation, without suggestion of payment to the next-of-kin, or compromise or release by them, and without their being parties to the assignment. It may be that if these children returned from abroad and took proceedings Mr. Maxwell's client would have a good defence to any action that might be brought. I am not deciding that. I decide that their mother continued as trustee for the family notwithstanding her marriage to Thomas Maguire, and that neither her marriage to him, nor the subsequent deed of

(1) 36 Ir. L. T. R. 108. (2) 69 L. T. (N. S.) 591.

March 28th, 1902, by which she assigned her interest in the lands under the will of Thomas Maguire to the vendor, created any alteration in her status as trustee, or divested her of her fiduciary capacity. She remained in occupation of the farm till the date of that deed of 1902, and died in 1903. Mr. Pringle's client has full notice of these facts, and could not, with any degree of safety, complete this purchase. The title is one which no Court would force upon a purchaser in the absence of a clear condition of sale binding the purchaser to take whatever title the vendor could give him. It is not suggested that there is a condition of that character here, which would compel a purchaser to accept what would be a bad title. I must, therefore, dismiss this summons, with an expression of opinion that the vendor has not shown a good title, order the deposit to be returned to the purchaser, and give him his costs.

The vendor appealed.

S. L. Brown, K.C., and *T. Henry Maxwell*, for the appellant :—

We contend that a good title has been shown by the vendor. No doubt on the death of Patrick Cosgrove, in 1864, his widow, Sarah Cosgrove, entered into possession of the farm, *quoad* two undivided thirds, as bailiff or trustee for her minor children, and she must be taken to have continued in possession in her capacity as such bailiff or trustee until something occurred to change the character of her possession (*Thomas* v. *Thomas* (1)), which would not be effected merely by the coming of age of the children : *Tinker* v. *Rodwell* (2). This case is, however, distinguishable from *Graham* v. *Chambers* (3), where Palles, C.B., held that a widow entering into possession of chattels real of her husband, on his death intestate, as bailiff for her minor children, was an express trustee, who could not as such acquire a title herself under the Statute of Limitations, as here Thomas Maguire, who was accepted as tenant in 1869, was a stranger to the children. Even assuming that Thomas Maguire entered in virtue of his wife's title, and that he too was originally in the position of a bailiff, we contend that the decision in *Graham* v. *Chambers* (3) cannot be sustained if it was there meant to decide that the nature of the bailiff's possession

(1) 2 K. & J. 79. (2) 69 L. T. (N. S.) 591. (3) 36 Ir. L. T. R. 108.

Appeal. 1907.

In re MAGUIRE AND M'CLELLAND'S CONTRACT.

could not be so changed as to enable the Statute of Limitations to run in his favour.

The relationship of guardian and ward can be dissolved by circumstances: *Wall* v. *Stanwick* (1); *In re Hobbs* (2); and we contend that a change in the nature of Thomas Maguire's possession is amply evidenced by the fact that each child of the former tenant left the farm without making any claim upon it. None of them have since returned, or asserted any claim, and the Statute of Limitations began to run against each child on his or her attaining twenty-one years of age. Their rights are, therefore, long since barred. This is not a doubtful title; the question depends on the general law of the land, which must be ascertained and determined by the Court, and if it be answered in the vendor's favour, the purchaser should be compelled to complete his contract: Fry, Specific Performance (4th ed.), p. 388; *Alexander* v. *Mills* (3). The vendor will, if required, undertake to make a statutory declaration that no claim has at any time been asserted by, or acknowledgment given to, the children of Patrick Cosgrove, since they left the farm.

[They also cited *Duffy* v. *Duffy* (4); *Burnside* v. *Burnside* (5).]

Horner, K.C., and *Pringle*, for the respondent:—

The onus resting on the vendor to show a good title has not been discharged. It is admitted that Sarah Cosgrove entered into possession of the farm on her husband's death as bailiff or guardian of her minor children, and Thomas Maguire, her second husband, could be in no better position than she. He was not a stranger to the children. *Graham* v. *Chambers* (6) is a clear authority in the purchaser's favour, as showing that no title was acquired by Thomas Maguire under the Statute of Limitations. His position being originally that of a bailiff or trustee, no facts have been proved to show that that position was ever changed within the meaning of the *dicta* in *Wall* v. *Stanwick* (1), and *Re Hobbs* (2). The mere fact of the children having left the farm is not sufficient,

(1) 34 Ch. D. 763; 768.
(2) 36 Ch. D. 553.
(3) L. R. 6 Ch. App. 124, at p. 131.
(4) [1906] 1 I. R. 205.
(5) *Ibid.* 218.
(6) 36 Ir. L. T. R. 108.

as that was consistent with the continuance of the relationship of trustee and *cestui que trust*. The vendor must show that they waived their rights as *cestuis que trust*, or acted in some way inconsistent with their position as such. So far as the purchaser is aware, a correspondence may have taken place between the children after leaving the farm, and the Maguires, and acknowledgments of the rights of the children or some of them given. Under the circumstances the purchaser was entitled to require the interests of the children to be accounted for, and to refuse to complete unless this was done. In any event we contend that the title shown is of such a doubtful nature that the Court ought not to force it upon the purchaser, where it is reasonably probable that its acceptance would involve him in litigation: Williams, Vendor and Purchaser, vol. ii., p. 1007.

A Court would not in this case give a clear direction to a jury that none of the children of Patrick Cosgrove had any title to the farm, but would leave a question to be decided by the jury on that point. There is, therefore, sufficient doubt to entitle the purchaser to relief: *Emery* v. *Grocock* (1); *Pyrke* v. *Waddingham* (2); *Mullings* v. *Trinder* (3).

SIR SAMUEL WALKER, C.:—

Patrick Cosgrove, the former tenant of the farm sold to the purchaser in this case, died in 1864, leaving a widow, a son John, the child of a former marriage, and four children by his second marriage, James, Hugh, Henry, and a daughter Catherine.

So far as regards John, he is out of the case altogether, because he went away in the lifetime of his father, in or about the year 1862; the relation of bailiff never existed between him and his father or mother. Therefore John is out of the case, although one of the contentions of the purchaser was that he should join in the assignment to him.

The widow was married to one Thomas Maguire, father of the vendor, in 1866, and in 1869 he had his name entered in the landlord's books as tenant of the farm. James went to America in 1872, and Hugh in 1876; Henry, the remaining son, emigrated

(1) 6 Madd. 54. (2) 10 Hare, 1. (3) L. R. 10 Eq. 449.

Appeal. 1907.

In re MAGUIRE AND M'CLELLAND'S CONTRACT.

Sir Samuel Walker, C.

in 1882; and Catherine entered a convent in 1882. From that time to the present they have not returned; and there is no evidence that they ever asserted a claim to a share in their father's assets. They must all have attained age in 1885, and in twelve years from that date, in 1897, their claims must have been barred by the Statute of Limitations, unless the existence of a relationship of bailiff takes the case out of the statute.

Thomas Maguire died in 1901, having by his will bequeathed the farm to his widow for her life, and after her death to the vendor; and in 1902 the widow released her life estate in favour of the vendor by deed, and died shortly afterwards.

Such being the title of the vendor, the requisition of the purchaser, that the interests of the children should be accounted for, was, *prima facie*, a reasonable one, seeing that they were all minors at the date of their father's death; but the vendor refused to comply with that requisition, stating that the children had been out of possession for more than twenty years, and that a good title had therefore been shown.

According, however, to the argument of Mr. Horner, a title never could be made, even after the lapse of fifty years or more, under the Statute of Limitations, because the children were minors at the date of the father's death. There is no case that so decides; the cases show that the relationship of principal and agent will be dissolved by circumstances; the attaining of twenty-one years of age by the children is not enough in itself to dissolve the relationship, provided there is no break: but here the children left the place a long time ago; no claim has ever been put forward by any of them; and I am of opinion that those facts constitute a sufficient break in the possession to dissolve the relationship of principal and agent or guardian and ward. In *Wall* v. *Stanwick* (1) Kekewich, J., said: "My view, however, is that she" (the mother) "is accountable as bailiff, and will continue to be so accountable until the relation of principal and agent has been dissolved. How that can be done, I do not for the moment consider." Well, unless that relation can be dissolved by a child going away, and remaining away for many years, without ever

(1) 34 Ch. D. 763, at p. 768.

putting forward any claim, I do not see under what circumstances it could be taken to be dissolved, or how any title could ever be made under the Statute of Limitations in cases of this sort.

The same principle is to be found in *In re Hobbs* (1), where North, J., said:—"The cases which have been cited show that, as he" (*i.e.* the father) "was in possession as John's bailiff at the time when John attained twenty-one, he must be taken to have continued in possession in the same character, unless something was done to change the character of his possession." What more important change could there be than the going away of children, abandoning the farm and leaving their step-father in possession?

Under these circumstances we cannot affirm the order of the Master of the Rolls; but we will take down the undertaking of the vendor to give a statutory declaration that no claim has been made by any of the children at any time since they left the farm; and subject to this we shall declare that a good title has been shown.

I do not think, however, that at the time the summons was issued a good title had been shown, and therefore, we will order the appellant to pay the costs incurred in the Court below; having regard to the fact that he has only now given the undertaking I have mentioned, we think that there should be no costs to either side of the appeal.

FITZ GIBBON, L.J.:—

The farm which is the subject of this case is held under a title which is becoming almost universal for the agricultural lands of Ireland. The amount of the purchase-money is substantial—£530—and we are dealing with a willing purchaser, whose objection to the title shown is made in good faith.

I feel that a decision against the title which will have been shown, if it can be proved by a statutory declaration that no claim has been made, and that no acknowledgment has been given, within the period of limitation, by or to any of the children who have left the place, would amount to an affirmance of a principle which

(1) 36 Ch. D. 553, at p. 557.

Appeal. 1907.

In re MAGUIRE AND M'CLELLAND'S CONTRACT.

Fitz Gibbon, L.J.

would make it almost impossible to make title at all to a large proportion of the tenanted land in this country.

We ought not to be influenced in our decision by that consideration, unless a good title is sufficiently proved, and we must act with caution, knowing that not merely in the Superior Courts, but also in the County Courts, claims to holdings are constantly put forward, often after long periods of years, and unexpectedly, by relatives of deceased tenants, generally hailing from America.

The principle for which Mr. Horner contends, if adopted, would prevent the specific performance of any agreement for the sale of land, where a question of fact, fit to be submitted to a jury, arose in respect of any possible claimant abroad. He contends that specific performance ought to be refused in every such case. I do not think so. In my opinion the Court must investigate such questions, putting itself in the place of a jury, and if it finds that the Judge could tell the jury that, if they believed the evidence, they ought to find against the claim, in that case the Court ought to hold the title to be sufficiently shown.

Here the vendor insisted on making title through Thomas Maguire and his will, beginning with the deed of 1902, by which his widow released her life estate, and which recited the tenancy of Thomas Maguire. The moment the purchaser ascertained that the farm originally was not Maguire's, that Cosgrove had been the tenant, and that Maguire came in by marrying Cosgrove's widow, who had children by her first husband, four of whom were minors at the date of their father's death, this rendered Thomas Maguire in equity a bailiff for these minor children, and the purchaser was right in insisting that their interests should be accounted for. What had occurred? Cosgrove had died in 1864, leaving a widow and five children, of whom four at least were still in possession with their mother, when in 1866, like most widows in possession of farms, she married a second husband. The position that then arose is a very common one in titles of this sort, and where a widow, *primâ facie* beneficially entitled to one-third only of her deceased husband's interest, remains in possession with minor children under her care as mother, it is idle to contend that a second husband, by getting himself accepted as tenant by the

landlord, can thereupon treat his tenancy as a good root of title, independently of those children.

But afterwards the four children so left living on the farm, for whom their mother was a bailiff when she married Maguire, and against whom he and she were doing what they had no right to do when they got the second husband's name inserted as tenant in the landlord's books, disappeared altogether from the farm. When each child left he or she had at least arrived at years of discretion, they all knew that the farm had been their father's, that their mother was still living on it, and that she had married their stepfather, and that he had taken their father's place as tenant. Can I, as a juror, have any doubt that when Catherine went into a convent in 1882, provision being presumably made for her, she finally left her mother's house, making no claim against the land. The eldest son was of age when his father died, there was never any relationship of guardian and ward between him and his mother; on his father's death he became entitled to his share; eldest sons when they have claims generally make them on their father's death; *a fortiori*, when the mother married in 1866—forty-one years ago—it is to be presumed that this son would have made a claim if he had one. When I am asked—"Where is the break in the possession?"—I answer, that it is to be inferred from the break in the title evidenced by the fact that the stepfather was never interfered with, though he became the tenant, from 1866 to the present time. I would tell the jury, in an ejectment, that as each son of the former tenant left the place without making any claim, he supplied some evidence that he had no claim, and that when many years had passed, and the statutory period had expired, and still no claim was made, it ought to be presumed that the former tenant's interest was extinguished under the Statute of Limitations. But it is impossible for us to hold that a good title has been shown as the matter stands on the requisitions. Though the purchaser's contention here went too far, the answer to his requisition was a flat refusal to answer any question about the matter, treating the Cosgrove family as out of the case from the time Maguire came in. The requisition was right in form; the purchaser called on the vendor to account for the interest of the children; any account of them was refused; no information

Appeal. 1907.

In re MAGUIRE AND M'CLELLAND'S CONTRACT.

Magherastephana and county of Fermanagh, which he held under a yearly tenancy, on the estate of the Earl of Erne, on which estate the Ulster Custom existed. The said Patrick Cosgrove died intestate in the year 1864, leaving him surviving his widow, Sarah Cosgrove, and five children, namely, John (his son by a former marriage), and four children of his marriage with the said Sarah Cosgrove—James, Hugh, Henry, and Catherine—all the said children of the second marriage being minors at the date of their father's death. On the death of Patrick Cosgrove in 1864 his widow remained in occupation of the farm with her minor children (John Cosgrove, who was then of age, having emigrated to America prior to his father's death), and, in the year 1866, the widow married one Thomas Maguire, with whom she remained in occupation of the farm until the death of Thomas Maguire in 1901.

James Cosgrove emigrated to America in 1872, Hugh in 1876, and Henry in 1882; and Catherine Cosgrove entered a convent in 1882. None of the said children had ever returned to the farm, or asserted a claim to a share in their father's assets, and no administration to the father's estate was ever taken out.

Thomas Maguire, who was accepted as tenant of the farm in 1869 (when his name was inserted as tenant in the rental of the Erne estate), by his will, dated the 11th September, 1901, bequeathed the farm to his wife, the said Sarah Cosgrove, for her life, and after her death to his son, John Thomas Maguire, to whom probate of the will was duly granted as executor. Sarah Cosgrove remained in possession of the farm to the 28th March, 1902, when, by an indenture of that date, she assigned the farm to her son John Thomas Maguire, freed and discharged from her life estate therein.

John Thomas Maguire put up the farm for sale by public auction on the 25th January, 1907, when the present respondent, Samuel M'Clelland, was declared the purchaser at the price of £530, and a memorandum confirming the sale was duly signed by the vendor and purchaser.

The conditions of sale provided, *inter alia*, that the title to the farm should commence with a letter from the agent of the property, certifying that Thomas Maguire was tenant in 1886, and the abstract of title furnished to the purchaser commenced with

the tenancy of Thomas Maguire, as provided for, and set out his will and probate thereof, and the assignment of the 28th March, 1902, to the vendor, as above mentioned. In answer to certain requisitions made on behalf of the purchaser, it appeared that no administration was ever taken out to the estate of Patrick Cosgrove, and that no assignment had ever been made to Thomas Maguire: whereupon the following further requisition was made on behalf of the purchaser:—"Assuming that Patrick Cosgrove died intestate, his widow remained in possession upon his death under the title acquired by his intestacy on behalf of herself and the minor, John Cosgrove, the son of Patrick, and in 1886 Thomas Maguire and his wife were trustees for John as to two-thirds of the farm. John Cosgrove must, therefore, join in the assignment to the purchaser." To this the answer was given—"John Cosgrove is now aged about sixty-three years of age, and is resident in U. S. A., and has not been in this country since. Vendor's solicitor fails to see that he has any claim, and refuses to ask him to sign the assignment." The following further requisition was then made on behalf of the purchaser:—"The purchaser has now ascertained that at the date of Patrick Cosgrove's death he also left four minor children, who continued to reside with their mother on this farm. The interests of these children must be also accounted for, as their mother became a trustee for them. The purchaser insists that John must join in the assignment." To this the answer was—"Vendor refuses to comply with this requisition. Vendor's father was in possession for over twenty years, and the four minors are out of possession over twenty-five years, so their claim, if any, is statute-barred. Purchaser's solicitor will note that Thomas Maguire was accepted by the landlord as tenant prior to 1870." On receipt of this answer the purchaser's solicitor wrote, refusing to accept the title unless the interests of the children of Patrick Cosgrove were accounted for, and requiring a return of the purchaser's deposit, whereupon the present summons was instituted by the vendor.

The following judgment was delivered on the 19th April, 1907, by His Honor the Master of the Rolls (1):—

(1) Reported by Mr. Lawson.

Ross, J. 1907.

BUTLER v. BLACKALL.

Butler and Richard Galway, their executors, administrators, and assigns, for the term of 500 years, upon trust, in the first place, for securing certain rentcharges, and subject thereto "upon further trust, by the direction or request in writing of the said William Butler the younger and Margaret M'Namara, during their joint lives, or of the survivor of them, . . . but subject and without prejudice to the said rentcharges, to raise and levy out of the said lands and hereditaments, in case there shall be one child and no more of the said intended marriage, other than an eldest or only son, entitled to the inheritance of the said hereditaments under the limitations hereinbefore contained, the sum of £2500; or in case there shall be two children and no more of such intended marriage, other than an eldest or only son entitled as aforesaid, the sum of £3000; or in case there shall be three or more children of such marriage, other than an eldest or only son entitled as aforesaid, the sum of £4500, together with interest upon said respective sums at the rate of 5 per cent. per annum from the time same shall respectively be receivable. And as to the money which shall become raisable under the trust lastly declared, in trust as a portion or portions for the child, or all such one or more exclusively of the other or others of the children of the said intended marriage other than an eldest or only son, for such interest or interests, in such shares, to be vested and paid on such contingencies, or at such period or periods, and in such manner in all respects as the said William Butler the younger and Margaret M'Namara, by any deed or deeds or other writing, revocable or irrevocable, executed by them in the presence of and attested by at least one witness, shall direct and appoint; and in default of such direction or appointment, and subject to any partial direction or appointment, as the survivor of them, the said William Butler the younger and Margaret M'Namara, shall in like manner direct or appoint; and in default of such direction or appointment, and subject to any partial direction or appointment, in trust as a portion or portions for the child, if only one, or all the children, if more than one, of the said intended marriage, other than an eldest or only son entitled as aforesaid, who shall attain the age of twenty-one years, or shall marry, whichever shall first happen, such children, if more than one, to take in equal shares."

The settlement also contained a further power to appoint certain lands among the younger children of the marriage, who, in default of appointment, were to take equally.

Mrs. Margaret Butler, by deed poll dated 12th July, 1888, recited the above grant, and that there were issue of the said marriage six children, of whom four were now living, namely, William Butler, the eldest son, Margaret Stella Butler, Isabella Emily Butler, and Justin Alban Butler, and that William Butler the younger died without ever having exercised the power of appointment, and that Isabella Emily Butler had attained the age of twenty-one years, and that a marriage was intended to be solemnized between Isabella Emily Butler and Henry Blackall, and then proceeded as follows:—

"Now these presents witness that in exercise and execution of the hereinbefore recited power in that behalf in the said recited indenture of settlement contained, she, the said Margaret Butler, doth by this deed direct that the sum of £1500, being one-third portion of the sum of £4500 so raisable as aforesaid under the trusts of the said term of 500 years, shall accordingly be raised, and also interest therefor at the rate of £5 per cent. per annum, and doth hereby appoint that the said sum of £1500, and the interest thereon as aforesaid, shall, immediately upon the execution of these presents (but subject to the prior trusts of the said term), belong to and be vested in the said Isabella Emily Butler, and be held in trust for the said Isabella Emily Butler, her executors, administrators, and assigns; and these presents further witness that in exercise and execution of the power in that behalf contained in the hereinbefore recited indenture of settlement, she, the said Margaret Butler, doth by this deed appoint that, subject to the right of the said Margaret Butler to receive the rents and profits thereof during her life, one moiety of" (mentioning the lands subject to the power) "shall, immediately upon the execution of these presents, belong to and be vested in the said Isabella Emily Butler, and be held in trust for the said Isabella Emily Butler, her heirs and assigns."

Mrs. Butler died without making any further appointment. All the lands subject to the charge had now (1907) been sold on the petition of John Gilbert King, and, after providing for all

Appeal. 1907.

In re MAGUIRE AND M'CLELLAND'S CONTRACT.

could not be so changed as to enable the Statute of Limitations to run in his favour.

The relationship of guardian and ward can be dissolved by circumstances: *Wall* v. *Stanwick* (1); *In re Hobbs* (2); and we contend that a change in the nature of Thomas Maguire's possession is amply evidenced by the fact that each child of the former tenant left the farm without making any claim upon it. None of them have since returned, or asserted any claim, and the Statute of Limitations began to run against each child on his or her attaining twenty-one years of age. Their rights are, therefore, long since barred. This is not a doubtful title; the question depends on the general law of the land, which must be ascertained and determined by the Court, and if it be answered in the vendor's favour, the purchaser should be compelled to complete his contract: Fry, Specific Performance (4th ed.), p. 388; *Alexander* v. *Mills* (3). The vendor will, if required, undertake to make a statutory declaration that no claim has at any time been asserted by, or acknowledgment given to, the children of Patrick Cosgrove, since they left the farm.

[They also cited *Duffy* v. *Duffy* (4); *Burnside* v. *Burnside* (5).]

Horner, K.C., and *Pringle*, for the respondent:—

The onus resting on the vendor to show a good title has not been discharged. It is admitted that Sarah Cosgrove entered into possession of the farm on her husband's death as bailiff or guardian of her minor children, and Thomas Maguire, her second husband, could be in no better position than she. He was not a stranger to the children. *Graham* v. *Chambers* (6) is a clear authority in the purchaser's favour, as showing that no title was acquired by Thomas Maguire under the Statute of Limitations. His position being originally that of a bailiff or trustee, no facts have been proved to show that that position was ever changed within the meaning of the *dicta* in *Wall* v. *Stanwick* (1), and *Re Hobbs* (2). The mere fact of the children having left the farm is not sufficient,

(1) 34 Ch. D. 763; 768.
(2) 36 Ch. D. 553.
(3) L. R. 6 Ch. App. 124, at p. 131.
(4) [1906] 1 I. R. 205.
(5) *Ibid.* 218.
(6) 36 Ir. L. T. R. 108.

as that was consistent with the continuance of the relationship of trustee and *cestui que trust*. The vendor must show that they waived their rights as *cestuis que trust*, or acted in some way inconsistent with their position as such. So far as the purchaser is aware, a correspondence may have taken place between the children after leaving the farm, and the Maguires, and acknowledgments of the rights of the children or some of them given. Under the circumstances the purchaser was entitled to require the interests of the children to be accounted for, and to refuse to complete unless this was done. In any event we contend that the title shown is of such a doubtful nature that the Court ought not to force it upon the purchaser, where it is reasonably probable that its acceptance would involve him in litigation: Williams, Vendor and Purchaser, vol. ii., p. 1007.

A Court would not in this case give a clear direction to a jury that none of the children of Patrick Cosgrove had any title to the farm, but would leave a question to be decided by the jury on that point. There is, therefore, sufficient doubt to entitle the purchaser to relief: *Emery* v. *Grocock* (1); *Pyrke* v. *Waddingham* (2); *Mullings* v. *Trinder* (3).

SIR SAMUEL WALKER, C.:—

Patrick Cosgrove, the former tenant of the farm sold to the purchaser in this case, died in 1864, leaving a widow, a son John, the child of a former marriage, and four children by his second marriage, James, Hugh, Henry, and a daughter Catherine.

So far as regards John, he is out of the case altogether, because he went away in the lifetime of his father, in or about the year 1862; the relation of bailiff never existed between him and his father or mother. Therefore John is out of the case, although one of the contentions of the purchaser was that he should join in the assignment to him.

The widow was married to one Thomas Maguire, father of the vendor, in 1866, and in 1869 he had his name entered in the landlord's books as tenant of the farm. James went to America in 1872, and Hugh in 1876; Henry, the remaining son, emigrated

(1) 6 Madd. 54. (2) 10 Hare, 1. (3) L. R. 10 Eq. 449.

Appeal. 1907.

In re MAGUIRE AND M'CLELLAND'S CONTRACT.

Sir Samuel Walker, C.

in 1882; and Catherine entered a convent in 1882. From that time to the present they have not returned; and there is no evidence that they ever asserted a claim to a share in their father's assets. They must all have attained age in 1885, and in twelve years from that date, in 1897, their claims must have been barred by the Statute of Limitations, unless the existence of a relationship of bailiff takes the case out of the statute.

Thomas Maguire died in 1901, having by his will bequeathed the farm to his widow for her life, and after her death to the vendor; and in 1902 the widow released her life estate in favour of the vendor by deed, and died shortly afterwards.

Such being the title of the vendor, the requisition of the purchaser, that the interests of the children should be accounted for, was, *prima facie*, a reasonable one, seeing that they were all minors at the date of their father's death; but the vendor refused to comply with that requisition, stating that the children had been out of possession for more than twenty years, and that a good title had therefore been shown.

According, however, to the argument of Mr. Horner, a title never could be made, even after the lapse of fifty years or more, under the Statute of Limitations, because the children were minors at the date of the father's death. There is no case that so decides; the cases show that the relationship of principal and agent will be dissolved by circumstances; the attaining of twenty-one years of age by the children is not enough in itself to dissolve the relationship, provided there is no break: but here the children left the place a long time ago; no claim has ever been put forward by any of them; and I am of opinion that those facts constitute a sufficient break in the possession to dissolve the relationship of principal and agent or guardian and ward. In *Wall* v. *Stanwick* (1) Kekewich, J., said: "My view, however, is that she" (the mother) "is accountable as bailiff, and will continue to be so accountable until the relation of principal and agent has been dissolved. How that can be done, I do not for the moment consider." Well, unless that relation can be dissolved by a child going away, and remaining away for many years, without ever

(1) 34 Ch. D. 763, at p. 768.

putting forward any claim, I do not see under what circumstances it could be taken to be dissolved, or how any title could ever be made under the Statute of Limitations in cases of this sort.

The same principle is to be found in *In re Hobbs* (1), where North, J., said:—"The cases which have been cited show that, as he" (*i.e.* the father) "was in possession as John's bailiff at the time when John attained twenty-one, he must be taken to have continued in possession in the same character, unless something was done to change the character of his possession." What more important change could there be than the going away of children, abandoning the farm and leaving their step-father in possession?

Under these circumstances we cannot affirm the order of the Master of the Rolls; but we will take down the undertaking of the vendor to give a statutory declaration that no claim has been made by any of the children at any time since they left the farm; and subject to this we shall declare that a good title has been shown.

I do not think, however, that at the time the summons was issued a good title had been shown, and therefore, we will order the appellant to pay the costs incurred in the Court below; having regard to the fact that he has only now given the undertaking I have mentioned, we think that there should be no costs to either side of the appeal.

FITZ GIBBON, L.J.:—

The farm which is the subject of this case is held under a title which is becoming almost universal for the agricultural lands of Ireland. The amount of the purchase-money is substantial—£530—and we are dealing with a willing purchaser, whose objection to the title shown is made in good faith.

I feel that a decision against the title which will have been shown, if it can be proved by a statutory declaration that no claim has been made, and that no acknowledgment has been given, within the period of limitation, by or to any of the children who have left the place, would amount to an affirmance of a principle which

(1) 36 Ch. D. 553, at p. 557.

Appeal. 1907.

In re MAGUIRE AND M'CLELLAND'S CONTRACT.

Fitz Gibbon, L.J.

would make it almost impossible to make title at all to a large proportion of the tenanted land in this country.

We ought not to be influenced in our decision by that consideration, unless a good title is sufficiently proved, and we must act with caution, knowing that not merely in the Superior Courts, but also in the County Courts, claims to holdings are constantly put forward, often after long periods of years, and unexpectedly, by relatives of deceased tenants, generally hailing from America.

The principle for which Mr. Horner contends, if adopted, would prevent the specific performance of any agreement for the sale of land, where a question of fact, fit to be submitted to a jury, arose in respect of any possible claimant abroad. He contends that specific performance ought to be refused in every such case. I do not think so. In my opinion the Court must investigate such questions, putting itself in the place of a jury, and if it finds that the Judge could tell the jury that, if they believed the evidence, they ought to find against the claim, in that case the Court ought to hold the title to be sufficiently shown.

Here the vendor insisted on making title through Thomas Maguire and his will, beginning with the deed of 1902, by which his widow released her life estate, and which recited the tenancy of Thomas Maguire. The moment the purchaser ascertained that the farm originally was not Maguire's, that Cosgrove had been the tenant, and that Maguire came in by marrying Cosgrove's widow, who had children by her first husband, four of whom were minors at the date of their father's death, this rendered Thomas Maguire in equity a bailiff for these minor children, and the purchaser was right in insisting that their interests should be accounted for. What had occurred? Cosgrove had died in 1864, leaving a widow and five children, of whom four at least were still in possession with their mother, when in 1866, like most widows in possession of farms, she married a second husband. The position that then arose is a very common one in titles of this sort, and where a widow, *primâ facie* beneficially entitled to one-third only of her deceased husband's interest, remains in possession with minor children under her care as mother, it is idle to contend that a second husband, by getting himself accepted as tenant by the

landlord, can thereupon treat his tenancy as a good root of title, independently of those children.

But afterwards the four children so left living on the farm, for whom their mother was a bailiff when she married Maguire, and against whom he and she were doing what they had no right to do when they got the second husband's name inserted as tenant in the landlord's books, disappeared altogether from the farm. When each child left he or she had at least arrived at years of discretion, they all knew that the farm had been their father's, that their mother was still living on it, and that she had married their stepfather, and that he had taken their father's place as tenant. Can I, as a juror, have any doubt that when Catherine went into a convent in 1882, provision being presumably made for her, she finally left her mother's house, making no claim against the land. The eldest son was of age when his father died, there was never any relationship of guardian and ward between him and his mother; on his father's death he became entitled to his share; eldest sons when they have claims generally make them on their father's death; *a fortiori*, when the mother married in 1866—forty-one years ago—it is to be presumed that this son would have made a claim if he had one. When I am asked—"Where is the break in the possession?"—I answer, that it is to be inferred from the break in the title evidenced by the fact that the stepfather was never interfered with, though he became the tenant, from 1866 to the present time. I would tell the jury, in an ejectment, that as each son of the former tenant left the place without making any claim, he supplied some evidence that he had no claim, and that when many years had passed, and the statutory period had expired, and still no claim was made, it ought to be presumed that the former tenant's interest was extinguished under the Statute of Limitations. But it is impossible for us to hold that a good title has been shown as the matter stands on the requisitions. Though the purchaser's contention here went too far, the answer to his requisition was a flat refusal to answer any question about the matter, treating the Cosgrove family as out of the case from the time Maguire came in. The requisition was right in form; the purchaser called on the vendor to account for the interest of the children; any account of them was refused; no information

Appeal. 1907.

In re MAGUIRE AND M'CLELLAND'S CONTRACT.

Fitz Gibbon, L.J.

was given; and the vendor took his stand on Thomas Maguire's tenancy as the root of title.

The case came before the Master of the Rolls on the same contention; the only affidavit before the Court was that of the solicitor who witnessed the deed of 1892, and there was no affidavit by or on behalf of the vendor to show that no claim had been put forward, or that no acknowledgment had been given, on behalf of the children. In my opinion there is no presumption that no claim was made, and I hold the vendor bound to prove that no such claim has been made. The vendor is clearly in a position in which he must know whether there has been any claim or acknowledgment, for he has lived on the farm to the present day; and I hold without doubt that the purchaser has the right to insist upon having a categorical statement, in the form of a statutory declaration by the vendor, showing that there has been nothing to bar the operation of the Statute of Limitations, or to show the assertion of any title by the Cosgrove children.

Our order will be, that on the affidavits and under the circumstances of the case, and upon the undertaking of the vendor that he will give a statutory declaration that there has been no claim by, or acknowledgment to, any of the Cosgrove children, or any person claiming through them, since 1882, a good title has been shown.

HOLMES, L.J.:—

I assume that down to 1882, the position of the mother was that of trustee or bailiff for her children, or some of them, in respect of the share or shares to which they were entitled; but I also hold that in 1882 all the children had left the place, the daughter having entered a convent, and the sons having gone to America. These facts, taken in connexion with the fact that no claim has ever been made to recover the lands down to the present time, show that at that date at the latest the relation of guardian and ward, or principal and agent, or trustee and *cestui que trust* came to an end, and that the Statute of Limitations thereupon began to run against the interests of the children.

I do not think that it is strictly necessary that there should

be a statutory declaration given by the vendor, but as it may be of some advantage to the purchaser to have the document, it is reasonable enough that, with the consent of the vendor, it should be made.

Solicitor for the appellant: *Leslie Winslow.*

Solicitor for the respondent: *W. A. Parke.*

R. ST. J. C.

BUTLER *v.* BLACKALL.

Power of appointment—Extent of exercise—Appointment of specified sum described as one-third portion—Deficiency of fund.

A donee of a power of appointment in favour of younger children over a sum of £4500, raisable out of lands, and over lands, which money and lands in default of appointment were to be divided equally among the objects of the power, by deed poll, executed at a date when three objects of the power were living, and on the intended marriage of I. E. B., one of the objects of the power, directed and appointed as follows:—"That the sum of £1500, being one-third portion of the sum of £4500 so raisable as aforesaid, . . . shall accordingly be raised, and also interest therefor at the rate of 5 per cent. per annum; and doth hereby appoint that the said sum of £1500 and the interest thereon as aforesaid shall, immediately upon the execution of these presents, . . . belong to and be vested in the said I. E. B."; and also appointed to I. E. B. one moiety of the lands, but did not at any time make any appointment of the residue. The lands proving insufficient to realize £4500:—

Held, that the specific sum of £1500 and interest was appointed and payable in full out of the deficient gross sum.

ORIGINATING SUMMONS for the determination of the effect and extent of an appointment.

The appointment was made by deed poll by Mrs. Margaret Butler, in exercise of a power conferred on her by the marriage settlement, dated 22nd April, 1861, and executed on the marriage of Wm. Butler the younger and Margaret M'Namara. By the said settlement Wm. Butler the elder granted to Lambert Butler and his heirs the lands therein mentioned, to hold to the said Lambert Butler, his heirs and assigns, to the uses and upon the trusts therein mentioned and declared, and subject thereto to the use of Nicholas

Ross, J. 1907.

BUTLER v. BLACKALL.

Butler and Richard Galway, their executors, administrators, and assigns, for the term of 500 years, upon trust, in the first place, for securing certain rentcharges, and subject thereto "upon further trust, by the direction or request in writing of the said William Butler the younger and Margaret M'Namara, during their joint lives, or of the survivor of them, . . . but subject and without prejudice to the said rentcharges, to raise and levy out of the said lands and hereditaments, in case there shall be one child and no more of the said intended marriage, other than an eldest or only son, entitled to the inheritance of the said hereditaments under the limitations hereinbefore contained, the sum of £2500; or in case there shall be two children and no more of such intended marriage, other than an eldest or only son entitled as aforesaid, the sum of £3000; or in case there shall be three or more children of such marriage, other than an eldest or only son entitled as aforesaid, the sum of £4500, together with interest upon said respective sums at the rate of 5 per cent. per annum from the time same shall respectively be receivable. And as to the money which shall become raisable under the trust lastly declared, in trust as a portion or portions for the child, or all such one or more exclusively of the other or others of the children of the said intended marriage other than an eldest or only son, for such interest or interests, in such shares, to be vested and paid on such contingencies, or at such period or periods, and in such manner in all respects as the said William Butler the younger and Margaret M'Namara, by any deed or deeds or other writing, revocable or irrevocable, executed by them in the presence of and attested by at least one witness, shall direct and appoint; and in default of such direction or appointment, and subject to any partial direction or appointment, as the survivor of them, the said William Butler the younger and Margaret M'Namara, shall in like manner direct or appoint; and in default of such direction or appointment, and subject to any partial direction or appointment, in trust as a portion or portions for the child, if only one, or all the children, if more than one, of the said intended marriage, other than an eldest or only son entitled as aforesaid, who shall attain the age of twenty-one years, or shall marry, whichever shall first happen, such children, if more than one, to take in equal shares."

The settlement also contained a further power to appoint certain lands among the younger children of the marriage, who, in default of appointment, were to take equally.

Mrs. Margaret Butler, by deed poll dated 12th July, 1888, recited the above grant, and that there were issue of the said marriage six children, of whom four were now living, namely, William Butler, the eldest son, Margaret Stella Butler, Isabella Emily Butler, and Justin Alban Butler, and that William Butler the younger died without ever having exercised the power of appointment, and that Isabella Emily Butler had attained the age of twenty-one years, and that a marriage was intended to be solemnized between Isabella Emily Butler and Henry Blackall, and then proceeded as follows:—

"Now these presents witness that in exercise and execution of the hereinbefore recited power in that behalf in the said recited indenture of settlement contained, she, the said Margaret Butler, doth by this deed direct that the sum of £1500, being one-third portion of the sum of £4500 so raisable as aforesaid under the trusts of the said term of 500 years, shall accordingly be raised, and also interest therefor at the rate of £5 per cent. per annum, and doth hereby appoint that the said sum of £1500, and the interest thereon as aforesaid, shall, immediately upon the execution of these presents (but subject to the prior trusts of the said term), belong to and be vested in the said Isabella Emily Butler, and be held in trust for the said Isabella Emily Butler, her executors, administrators, and assigns; and these presents further witness that in exercise and execution of the power in that behalf contained in the hereinbefore recited indenture of settlement, she, the said Margaret Butler, doth by this deed appoint that, subject to the right of the said Margaret Butler to receive the rents and profits thereof during her life, one moiety of" (mentioning the lands subject to the power) "shall, immediately upon the execution of these presents, belong to and be vested in the said Isabella Emily Butler, and be held in trust for the said Isabella Emily Butler, her heirs and assigns."

Mrs. Butler died without making any further appointment. All the lands subject to the charge had now (1907) been sold on the petition of John Gilbert King, and, after providing for all

Ross, J. 1907.

BUTLER v. BLACKALL.

prior charges, a sum of £2950 was standing to the credit of the matter available to meet the charge of £4500 for portions for younger children.

The trustees of Mrs. Isabella Emily Blackall's marriage settlement claimed that the full sum of £1500, with interest from 1888, should be paid to them, and the result of this payment would be that very little would be available for Margaret Stella Butler.

Margaret Stella Butler brought the present summons for the opinion of the Court on the question whether the defendants, as trustees for Mrs. Isabella Emily Blackall, were entitled to be paid the sum of £1500 and interest in priority to the other objects of the power.

G. W. Walker, K.C., and *Philip A. O'C. White*, for the plaintiff:—

This is an appointment of an aliquot part. "Being one-third" is a definition clause of the £1500. The draughtsman intended to deal in aliquot parts, for he appoints a moiety of the lands. The appointment recites that there are four children. If the recitals are clear, and the operative part of a deed is ambiguous, the recitals govern the construction: Norton on Deeds, p. 185. No case can be cited where, if the share was described as fractional, the appointee was entitled to be paid in full, notwithstanding a deficiency.

[They cited *Page* v. *Leapingwell* (1); *Cruddas* v. *Smith* (2); *Booth* v. *Alington* (3); *Wilson* v. *Kenrick* (4).]

Serjeant O'Connor, K.C., and *Pierce Nolan*, for the defendants, the trustees of Mrs. Blackall's marriage settlement:—

The document to be construed is the settlement; the appointment must be read into the settlement. The settlement was "in trust to raise." The £1500 was intended to be raised at once. The object of the appointment was to provide a fortune of £1500 immediately raisable. In order to be immediately raisable, it must be a definite sum. The intention was that the £1500 should

(1) 18 Ves. 463.
(2) [1900] 1 Ch. 730.
(3) 6 D. M. & G. 613.
(4) 31 Ch. D. 658.

be immediately payable. The appointment of a moiety instead of a third of the lands is in our favour.

[They cited *Stokes* v. *Bridgman* (1); *Rawlins* v. *M'Mahon* (2).]

Ross, J. :—

July 15.

I must confess that it would be a gratification to me if I could divide the fund equally among the children; but it is not open to me to do so on the true construction of the settlement and deed of appointment.

Where the appointment of a fund is exercised by appointing fractional parts, say ½ or ¼, there is no priority, there cannot be an immediate division, and till the whole money is raised, the amount of such shares cannot be ascertained. But where the appointer proceeds by way of figures, dealing with a definite sum, portion of the whole fund, it is different, and the person in whose favour the first sum is appointed takes that sum in priority. This case raises a new point. The appointer appointed a specific sum, describing it as being one-third portion of the gross sum. I must therefore deal with the matter, having regard to all the circumstances of the case and the documents. The recitals in the deed poll of 12th July, 1888, recite the indenture of marriage settlement of 22nd April, 1861, and the power therein given to raise a sum of £4500, portions for younger children; that four of the issue of the marriage were now living, namely, the eldest son, William Butler, and three others, Margaret Stella, Isabella Emily, and Justin Alban; and that a marriage was intended to be shortly solemnized between the said Isabella Emily Butler and Henry Blackall. The appointer no doubt recites the above for the purpose of indicating her reasons for the way in which she deals with the fund. She then directs "that the sum of £1500, *being one-third portion* of the sum of £4500 so raisable as aforesaid under the trusts of the said term of 500 years, shall accordingly be raised, and also interest therefor at the rate of £5 per cent. per annum." This is merely a direction to raise the money, but it is not an appointment. When

(1) 47 L. J., Ch. (N. S.) 759. (2) 6 D. M. & G. at p. 618.

Ross, J.
1907.

BUTLER
v.
BLACKALL.

she comes to the actual words of appointment, she directs "that the said sum of £1500, and the interest therefor as aforesaid, shall immediately belong to and be vested in the said Isabella Emily Butler, and be held in trust for the said Isabella Emily Butler, her executors, administrators, and assigns." Here the fraction disappears, and it is the duty of the trustees to raise the £1500 and 5 per cent. as a definite sum. We must have regard to the fact that the appointment is incorporated in a settlement, on faith of which the marriage was entered into. The conveyancer was not possessed of much precision of mind, but he has expressed himself in words that admit of only one meaning. Further, that absolute equality was not intended is clear from the fact that the lands subject to the power were by the same deed appointed by moieties and not in thirds.

I am of opinion that this appointment was an appointment of a definite sum, and I declare accordingly. All parties must have their costs out of the fund.

Solicitor for the plaintiff: *Joseph Tierney.*
Solicitors for the defendants: *Thomas F. O'Connell & Son.*

D. M. S.

JAMESON *v.* FAHEY.

Barton, J. 1906. Nov. 8, 9, 10, 15, 16. *Appeal.* 1907. May 10.

Right of turbary—Paring the surface of peat-land—Scraw-turf—Deep bog-turf—"Mountain."

A lease for lives renewable for ever, dated 1741, from the Corporation of C., reserved to the tenants of all Corporation lands certain rights of grazing over the neighbouring mountain of C., and the right to cut five slanes of turf on the mountain. The lease allowed the lessee to enclose the pasture lands for garden, corn, or meadowing, but not the lands subject to the right of turbary. The tenants having exhausted the deep bog-turf, of which there had been a considerable quantity on the mountain, claimed the right to pare "scraw"-turf off the surface of the mountain. The whole surface of the mountain was of a peaty character, and the top sod was everywhere capable of being pared off and used as fuel:—

Held, by Barton, J., that, upon the true construction of the lease, turf meant bog-turf, not scraw-turf, and that the right of turbary extended to any portion of the bog on the mountain fitted for digging turf, but not to the general surface of the mountain, although the surface might be capable of being used as fuel.

In several sub-leases of reclaimed arable land, and uncultivated mountain-land, rights of turbary had been given to sub-tenants over "the said mountain." This referred back to the demise of "the mountain" as "now and for some time past in the lessee's possession":—

Held, that the word "mountain" in this context did not refer to the whole "mountain of C.," but referred to the quality of the land, meaning the uncultivated mountain-land of which the sub-lessee had been in possession as distinguished from his reclaimed arable land.

Kildare v. *Fisher* (1 Str. 71) applied.

Decision of Barton, J., affirmed by the Court of Appeal.

THE plaintiffs were devisees of Henry Jameson, deceased, who by deed dated January 9th, 1899, in consideration of the sum of £2500, had purchased from the late Mr. Napier Higgins a property called the Mountain and Commons of Clonmel. This property, which was held under a sub-fee-farm grant, contained about 6,000 acres, and comprised some tenanted lands producing a net rent of upwards of £220 a year and a considerable portion of unenclosed mountain-land. A part of the unenclosed mountain-land, consisting of 671 acres, and called "the 671 acre lot," was

Barton, J. 1906.

JAMESON v. FAHEY.

the subject of this action. Before Higgins bought the property it had been in the possession of some persons called English, under a sub-lease for lives renewable for ever, which was converted into a fee-farm grant in 1855. Their interest was purchased by Mr. Higgins in the Landed Estates Court, and was conveyed to him by a Landed Estates Court Conveyance, dated July 26th, 1860. There was a second Landed Estates Court Conveyance made to Mr. Higgins in 1866, the validity of which had been a matter of controversy. The plaintiffs, however, did not rely upon the conveyance of 1866. They relied entirely upon the conveyance of 1860. The plaintiffs were sub-fee-farm grantees. The head interest belonged to the Corporation of Clonmel. They originally demised the Mountain and Commons of Clonmel, comprising these and other lands, to one Lackey, by a lease for lives renewable for ever, dated September 28th, 1741. Lackey's interest became vested in persons named Morton, and the renewable lease was converted into a fee-farm grant. Accordingly, the position of the property at the time of this action was that Morton was fee-farm grantee, paying a fee-farm rent for these and other lands to the Corporation of Clonmel, and that the plaintiffs (as successors in title of the Englishes and of Higgins) were sub-fee-farm grantees paying a rent to Morton.

In the original lease by the Corporation of Clonmel to Lackey, there was a reservation of rights of pasture and turbary in the form of a covenant by the lessee in favour of the Freemen of Clonmel, the tenants of the lands of the Clonmel Corporation, and the inhabitants of the town within the walls and of the liberties outside the walls. These rights of pasture and turbary, which were contained in the original lease of 1741, were repeated in identical terms in all the subsequent leases, grants, and sub-grants, and were contained in the Landed Estates Court Conveyance of 1860, in the same terms as in the original Corporation lease of 1741. The rights of pasture and turbary reserved in the original lease of 1741, and in all the subsequent grants and sub-grants, were as follows: "Liberty to the Freemen of the Town of Clonmel and each of them to graze ten collops apiece of their own property and no others, annually

on the premises granted by the said Corporation except on such part as should thereafter be enclosed for gardens, corn, or meadow . . . and likewise also reserving liberty to said Freemen to dig turf on said mountain and commons from and beyond the brow of the hill of the said mountain in sight of the said town of Clonmel not exceeding ten slanes each man, so that no turf shall be cut on the side of the mountain within sight of the said Town of Clonmel and further reserving unto the tenants of any lands or tenements belonging to the said Corporation of Clonmel and likewise to the inhabitants not Freemen being within the walls of the said town of Clonmel liberty to graze five collops on said lands and premises of their own property only and of no other and likewise to cut five slanes of turf in manner aforesaid and further reserving to all the inhabitants living within the liberties of Clonmel liberty to graze three collops on said lands and premises, in manner aforesaid, and to cut three slanes of turf only thereon, and if any more be cut than what was therein limited and appointed, then 6*d.* for every slane to be paid for such overplus."

The lease allowed the lessee to enclose the pasture lands for gardens, corn, or meadow, but not the lands subject to the right of turbary.

Evidence was given to the effect that the whole mountain consisted of peaty moorland, affording light pasture for cattle and sheep. It was all, or nearly all, of a more or less peaty character, and the top sod was nearly everywhere capable of being used for fuel, if pared off the surface. The top sods, when so pared off, were called "scraws." It also appeared that there must have been in 1741, at the date of the Corporation lease, plenty of deep bog-turf on the mountain—some 80 to 100 acres at all events. The tenants had confined themselves to cutting deep bog, down to about thirty-five or forty years before the bringing of the action. For thirty-five or forty years, the deep bog had been a dwindling quantity; and many of the Corporation tenants had pared "scraws" off the surface from time to time. There was evidence that this practice of paring "scraws" off the surface for fuel had been resorted to in the neighbourhood, and in other parts of the South of Ireland. On several large estates it was allowed subject

Barton, J. 1906.

JAMESON v. FAHEY.

to supervision by the landlord or agent. There was evidence that it would take from three to five years for the surface to recover itself, and that in order to enable it to recover itself a sufficient amount of soil should be left, variously estimated by the witnesses at from 2 to 9 inches. Upon a slope it would be necessary to be more careful than on flat ground, because on a slope the scour of the mountain would tend to wash the exposed surface, and leave bare the marl or rock below.

It was proved that a "slane" of turf meant so much turf as would be cut by a man with a "slane" in a day, and that a "slane" is an instrument used for cutting or digging turf out of a bog, and that it is not capable of being used for paring "scraws" off the surface. For that purpose a different instrument, called sometimes a "bosheen," is used. There was some evidence that there was little or no deep bog-turf on the side of the mountain facing the town of Clonmel. There was also evidence that appearances are often deceptive as to the existence of deep bog-turf.

There were sub-leases which were held by some of the tenants from the predecessors in title of the Jamesons, by which portions of reclaimed arable land and of unreclaimed mountain-land were demised for long terms, giving certain rights of cutting turf. The leases were of "part of the lands of Glendaloughin with the mountain and right of commonage thereunto belonging, now and for some time past in the lessee's possession." In the case of one of these tenants, James Harney, the sub-lease gave him "full and free liberty . . . to cut turf and litter on said mountain in each year during this demise for his own use." In the case of another tenant, Edward Tobin, there was a similar grant. These tenants claimed rights of paring scraws over the whole mountain under these sub-leases.

Moriarty, K.C., and *Corvan* (*Matheson, K.C.*, with them), for the plaintiffs :—

Scraws pared off the surface of the soil cannot be included in the word turf. At all events they are not included in the right of turbary given by this covenant. The covenant contemplates turf which can be dug or cut with a slane out of a bog, not "scraws,"

which are cut with a quite different instrument called a bosheen. If the right of turbary included the right to cut scraws, it would be destructive of the right of pasture given to the same commoners. The sub-leases could not have been intended to enlarge the right conferred by the superior lease.

Barton, J. 1906. JAMESON v. FAHEY.

Healy, K.C., and *Carrigan*, for the defendants :—

The action is shabby and oppressive; the common of turbary extended to every part of the mountain in the demise; there could be no enclosure against the right of turbary; turf really means peat, and the right extended wherever the soil was peaty and fit for fuel. The right of paring turf is largely exercised in England under a right of turbary, and was recognized in *Grant* v. *Gunner* (1). The sub-leases from the Englishes to Harney, Fahey, and John Tobin (Paddy Ned) gave the right of cutting turf over the whole mountain, and are binding on the plaintiffs.

BARTON, J. :—

Nov. 16.

The principal question for decision is whether the common of turbary reserved by the lease of 1741 included a right of paring sods of peat, commonly called "scraws," from the surface of the mountain pasture-lands, or was limited to cutting turf in bog, where bog was to be found on the mountain. In other words, What is the meaning of the words "turf" and "turbary" in this covenant or reservation?

It was suggested by plaintiffs' counsel that it is absurd to suppose that the paring of peat sods from the surface of the mountain could ever be included in a right of turbary. I think that view cannot be supported. The meaning of the word "turf" in a lease may be explained by the language of the lease, and by evidence of surrounding circumstances. In *Grant* v. *Gunner* (1) Mansfield, J. (at p. 448), said :—"The turf which is used in the neighbourhood from which this case comes, is the surface of the common, pared off with the heath." He then proceeds to speak of "peat, the substance of morasses which is in some places called 'turf.'" The practice of paring turf from the surface of the lands

(1) 1 Taunt. 435.

Barton, J. 1906.

JAMESON v. FAHEY.

of a manor was considered by Stirling, J., in *Robertson* v. *Hartop* (1). There is a passage in Elton on Commons and Waste Lands (1868 edition), p. 967, where the subject is referred to in connexion with the meaning which the word "turf" bears in England. It seems to me that it may be a question in each case of fact and intention what is meant by the word "turf" in any particular instrument. In England, where bogs are rare, paring turf from the surface seems to be a more usual mode of exercising a right of turbary than in Ireland, where bogs abound and paring is seldom heard of. In many parts of Ireland it would be regarded as unreasonable to suggest that turf meant anything but bog-turf. But that observation does not apply universally. The evidence in this case shows that paring the surface is a mode of obtaining fuel followed in parts of the south of Ireland, and that on several big estates, where peaty land is in the possession and under the control of the landlord, it is allowed, subject to careful supervision by the landlord or agent of the estate. In every case regard must be had to the language of the particular covenant or reservation, and to the surrounding circumstances, in so far as they may be admissible. In the present case I think that both the words of the covenant and the surrounding circumstances support the view that the right in this case was to cut or dig bog-turf, and not to pare turf-scraws.

The whole surface of this mountain consists of light pasture-moorland which is all, or nearly all, of a more or less peaty character; and the top sod is nearly everywhere capable of being used for fuel if pared off in "scraws." This was proved by several witnesses including one of the defendants' witnesses, who lives near the place and knows it well, and said that the whole surface of the mountain was like this scraw-turf. But, quite irrespective of this peaty moorland-pasture which extends over the whole mountain, there must have been in 1741 a good deal of deep bog-turf—some 80 to 100 acres at all events. In fact, there must have been enough deep bog to last for more than 100 years, because it was being regularly cut on the mountain in the deep bogs down to, at all events, thirty-five or forty years ago.

(1) 43 Ch. D. 484.

Accordingly there was in 1741 ample subject-matter to satisfy the right of turbary in the deep bog without interfering with the right of pasture over the moorland surface of the mountain. On the other hand, the construction for which the defendants contend involves this strange result, that this large body of tenants had liberty to cut away the whole surface of the mountain, over which by the same covenant they were given a right of pasturage. If turbary was limited to bog-turf, the rights of turbary and pasture are consistent and reconcilable; but these alleged rights of paring scraws over the whole mountain seem to be inconsistent and irreconcilable with the pasture rights over the same subject-matter.

There is another kindred consideration arising out of the legal conception of rights of turbary and pasture, respectively, and the essential differences between them. Two differences between the common of pasture and of turbary, respectively, have been referred to. In the first place, a common of pasture extends to every part of the demised premises on which there is food for cattle, or across which there is access to such food; but a common of turbary, from its nature, only extends to ground where turf is to be found. Secondly, the lease—following the rule of ancient law that there might be approvement against a right of pasturage, but not against a right of turbary—allowed the lessee to enclose the pasture lands for gardens, corn, or meadow, but not the lands the subject of the right of turbary, *i.e.*, the lands where turf was to be found. Keeping in view these points, I think the right of turbary was intended to be confined to the parts of the mountain where there was bog; and that it is unreasonable to construe the reservation as meaning that all the inhabitants of Clonmel were to have the right to pare the surface of the whole mountain, and to destroy the subject-matter of the right of pasturage. Clonmel was in 1741, as we know from the lease, a walled town, with inhabitants living within the walls and in the liberties outside. I cannot suppose that it was contemplated that all the inhabitants of the town and liberties were to have the right of paring the surface of the mountain. Such a general grant would be destructive of the right of pasturage reserved in the same clause. Furthermore, it has been argued that the

Barton, J. 1906. JAMESON v. FAHEY.

right of enclosure of the pasturage lands would be repugnant to the right of turbary, if the latter extended to the whole peaty mountain side and was practically coincident in subject-matter with the right of pasturage. All these difficulties and inconsistencies are reconciled, if the true construction of the reservation of turbary is this, that it extends to any portion of the bog on the mountain fitted for digging turf, but not to the general surface of the mountain, although that surface may be capable of being used as fuel.

But there is another argument, founded upon the words of the lease itself, which seems to me to be even more definite and convincing. The amount of turf to be taken by the commoners is measured by slanes. It is admitted that a slane means so much turf as would be cut by a man with a slane in a day, and it has been proved that a slane is an instrument used for cutting or digging turf out of a bog, but that it is not capable of being used for paring off scraws from the surface. For the latter purpose a different instrument is used, called sometimes a bosheen, but never called a slane. This was admitted by defendants' witnesses, one of whom said that this cutting of the surface with a bosheen was absolutely and entirely different from digging with a slane, and that the quantities which could be cut with a slane and with a bosheen would be quite different. Accordingly these words in this lease, by referring to an instrument and a method of measurement only applicable to turf dug or cut from a bog, and not applicable to turf pared from the surface, seem to me to make it tolerably clear that the right of turbary was to extend to the former kind of turf, and not to the latter.

The only argument *contra* was founded upon the provision in the reservation, that the right of turbary is not to extend to the side of the mountain within sight of the town of Clonmel. One witness—when recalled on another point—stated generally, that there was no deep bog-turf on that side; and, upon this piece of evidence, an argument was founded that this provision would be meaningless if the right of turbary was limited to bog-turf. The question of fact as to the existence or non-existence of any bog-turf on the side of the mountain within sight of Clonmel was not cleared up to my satisfaction. It was part of defendants' case,

on another branch of it, that appearances may be deceptive in regard to the existence of deep bog. But, assuming that an exhaustive examination would show that there is no bog turf on that side, that provision might have been inserted for greater caution; and I do not think that any inference should be drawn from its insertion which could counterbalance the much weightier considerations to which I have already referred.

I have, therefore, very little difficulty in deciding that in the reservation in the Corporation lease of 1741, turf meant turf to be found in any portion of bog upon the mountain of a kind capable of being cut by a slane, and did not extend to the ordinary moorland surface of the mountain, although that surface might be used for fuel if pared off the surface of the pasture lands by some other kind of instrument.

That disposes of the case in so far as the claim of the defendants as tenants of lands belonging to the Corporation of Clonmel is concerned. But three of them claim also as tenants of the Jameson estate, under sub-leases granted to them in 1855 by the Englishes, who were the plaintiffs' predecessors in title. It appears that the Englishes before selling the property in 1860, made a number of leases to occupying tenants, by which, as it seems to me, they purported to demise parcels of reclaimed arable land and of mountain (*i.e.* uncultivated land) for terms of 100 years or more, giving at the same time certain rights of cutting turf, and in some cases of cutting for sale. These sub-leases would bind the plaintiffs, who bought subject to them. Three of the defendants are tenants to the plaintiffs under sub-leases from the Englishes. These are, Thomas Fahey, James Harney, and John Tobin (Paddy Ned), who claims under one Edward or Edmond Tobin. As regards Fahey, he is not a tenant of Glendaloughin, but of another denomination called Glenary. There remain James Harney and John Tobin (Paddy Ned), who are tenants on Glendaloughin. Their cases have given me some trouble, because the language of their leases is somewhat loose and indefinite. But I have come to the conclusion that it was not intended to give them any rights outside their holdings, or at all events not upon the 671 acres. Their rights as regards the 671 acres are, I presume, the same

Barton, J. 1906.

JAMESON v. FAHEY.

as those of other tenants of lands belonging to the Corporation. To make sub-leases with rights of turbary larger than those in the original reservation might be an encroachment on the Corporation Commoners; and it is hardly likely that such was intended between a lessor bound by that covenant and a Corporation Commoner.

The sub-leases in these two cases included a demise of "all that and those part of the lands of Glendaloughin together with the mountain and right of commonage thereunto belonging now and for some time past in the lessee's possession." In the case of Harney, the sub-lease gave full and free liberty for the lessee to cut turf and litter on said mountain in each year, during this demise for his own use. In Tobin's case a similar right and liberty was given by the sub-lease. It will be observed that the right to cut turf and litter is only to be exercised upon the "said mountain." That is, "the mountain thereunto belonging, of which he was and had been in possession." That cannot mean the whole mountain of Clonmel. The reference to "the said mountain" must be to some limited area of which the tenant was and had been in possession, and does not, in my opinion, mean the whole mountain adjoining. As to the meaning of the word "mountain" in a context like this, reference may be made to *Kildare* v. *Fisher* (1). Applying that case to the present one, I hold that "the said mountain" in these sub-leases does not refer to the situation, but to the quality of the lands meaning "uncultivated lands," as distinguished from arable. In my opinion, the right to cut turf was limited to the "mountain" or uncultivated lands of which the sub-lessee was and had been in possession, and did not extend to the 671 acres, as regards which he has no greater right of turbary than those of other tenants of lands belonging to the Corporation.

As a result I must give the plaintiffs a declaration of their rights and an injunction. There remains the question of costs. There were some questions of fact decided in favour of the defendants, the conflict of evidence as to which occupied a considerable part of the trial. For this reason, and also for the reasons as to

(1) 1 Str. 71, 72.

costs given by Sir M. O'Loghlen in *Chatterton* v. *White* (1), and adopted by Lord O'Hagan in *Lifford* v. *Quin* (2), I think the judgment of the Court should be without costs.

Barton, J.
1906.

JAMESON
v.
FAHEY.

W. M'G.

The defendants appealed to the Court of Appeal (SIR S. WALKER, C., FITZGIBBON, L.J., and HOLMES, L.J.).

Appeal.
1907.
May 10.

Healy, K.C., and *Carrigan*, for the appellants.

Matheson, K.C., *Moriarty, K.C.*, and *Corvan*, for the respondents.

The Court dismissed the appeal with costs.

Solicitor for the plaintiffs: *David J. Higgins.*
Solicitor for the defendants: *Arnold Power.*

R. ST. J. C.

(1) 1 Ir. Eq. R. 200, at p. 202. (2) I. R. 7 Eq. 347, at pp. 357, 358.

M. R.
1907.
March 23.

Appeal.
June 5.

ALLISON *v.* JENKINS.

(1902. No. 477.)

Costs—Taxation—Action founded on salvage claim involving questions of contribution by numerous parties—Motion for judgment—Instructions for brief—Number of counsel—Fees—Registration as lis pendens*—Gen. Ord. LXV., R.* 65.

In an action for contribution by the plaintiff, who had made a salvage payment of upwards of £2000 on foot of head-rent, under the circumstances reported [1904] 1 I. R. 341, it became necessary to investigate the title of thirty-nine different persons for a period of thirty years; the statement of claim, which, in the opinion of the Court, was not of undue length, comprised twenty-three printed pages; and there were thirteen separate defences delivered. The plaintiff's solicitors sent instructions to junior counsel to settle reply, who, instead of doing so, advised moving for judgment on admissions in the pleadings delivered, and in default of defence as regarded the defendants who had not pleaded. This item included £5 5*s.* for instructions, £5 5*s.* fee to counsel, and £5 10*s.* 2*d.* for copies of documents. This was wholly disallowed on taxation, as was also a wide-line copy of the draft statement of claim for senior counsel to settle. A fee to senior counsel of £15 15*s.* to advise proofs was reduced to £6 6*s.*, and £225 for instructions for brief was reduced to £50. The costs of a second senior counsel on the motion for judgment, and instructions for brief on further consideration, were disallowed.

The above disallowances were, as stated by the Taxing Master, mainly based on the case having been brought to a hearing on motion for judgment.

The Taxing Master also disallowed the expense of a schedule prepared for use before the Chief Clerk at the inquiry, and reduced £52 14*s.*, for preparation of a notice, directed by the Chief Clerk for service on the defendants, to £13 13*s.*; reduced £21 paid to a surveyor by £6, and disallowed the registration of the action as a *lis pendens* on the ground that it was not registered until after the order on further consideration:—

Held, by the Master of the Rolls, that the Taxing Master had underestimated the importance and difficulties of the case, particularly in its early stages, and that the circumstance that the labour and attention expended in the initiation of the proceedings, which enabled the case to be ultimately dealt with on a motion for judgment, ought not to be used as a reason for minimising the solicitors' remuneration. Accordingly, the Master of the Rolls referred all the above-mentioned items back to the Taxing Master for re-consideration.

Held, by the Court of Appeal, that the allowance of fees in excess of the scale showed that the Taxing Master had appreciated the magnitude of the case, and, except as to the fee to counsel to draft reply and the registration of the action as a *lis pendens* (both of which the Court of Appeal allowed), that there was no error in principle; and the remaining items objected to being within the discretion of the Taxing Master, the Court of Appeal (reversing the decision of the Master of the Rolls as to them) *held*, that the taxation should stand.

MOTION on behalf of the plaintiff to review taxation of the plaintiff's costs in respect of items disallowed.

The plaintiff (1) brought an action against Anna Eliza Jenkins and several others, to enforce contribution from them towards the payment of arrears of head-rent and costs paid by her to the landlords, in order to save certain lands, known as the Bundoran estate, in which the plaintiff and the defendants were interested from eviction. The plaintiff was one of a large number of tenants holding property under sub-fee-farm grants, subject to a fee-farm rent of £868 6*s.* 2*d.* This rent had been let run into arrear, and in order to save the whole from eviction she paid the amount due to the head landlords.

The property was held under fee-farm grant of 1855, made by Trinity College to Thomas Connolly. The estate had been sold in lots in the Landed Estates Court, and six lots were made primarily liable to the head-rent in certain proportions, and were bound to indemnify the remaining lots accordingly. The principal questions to be determined in the action were as to the method and principle on which the liability of the defendants to contribute was to be ascertained, and the extent of that liability determined, and as to the incidence of costs on the different parties interested.

The Master of the Rolls (Sir A. M. Porter), on motion by the plaintiff for judgment, decided that the plaintiff was entitled to contribution on the principle of salvage, and that the owners of the lots should contribute according to the value of the lots at the date when the salvage payments were made, and not according to the net profit rent at the time of purchase, nor according to the present

(1) The action was brought by Mrs. Allison and another, but the former is referred to throughout as the plaintiff.

M. R. 1907.

ALLISON v. JENKINS.

value of the lots (1); and an inquiry at Chambers was directed, to ascertain the contribution payable by each person interested on this basis. It came on again for argument before the Master of the Rolls on March 16th, 1904, as regards the incidence of costs on the different classes of defendants, and a special order was made by him in reference to costs (2).

The principal items which were the subject of discussion appeared in part II. of the bill of costs.

Items 25–34 were for instructions for case for counsel to advise plaintiff as to the proceedings to be taken, having regard to the various defences, and to settle replies to defences, if necessary.

These included £5 5*s.* for instructions, £5 5*s.* fee paid to junior counsel, 6*s.* 8*d.* for attendance on him, and £5 19*s.* 2*d.* for copies of documents. The Taxing Officer disallowed these items.

In his report he stated as follows:—"I cannot allow these items as against the defendants. No reply was, in fact, delivered, and instead of a reply counsel drafted a notice of motion for judgment against all the defendants. This is a purely formal matter, and counsel are not, as a rule, allowed a fee for drafting such a notice. I have very carefully considered the matter in this case, and I see no reason to depart from the ordinary rule. I have, therefore, disallowed these items."

Item 85 was a fee of £15 15*s.* paid to senior counsel to advise proofs. The Taxing Officer deducted £9 9*s.* from this item. The plaintiff objected, and contended that the Master had no discretion to make such deduction. Senior counsel was sent, in addition to the case for proofs, all the defences, two cases which had already been submitted to junior counsel, and the documents referred to in the correspondence, amounting to about 1000 folios. The Taxing Officer held that in this case a fee of £15 15*s.* for direction of proofs was an unreasonable and extravagant fee, particularly having regard to the facts he called attention to in giving his decision on item 25, viz., that no reply was filed, and that two defences which were filed were withdrawn, and that counsel had drawn the notice of motion for judgment on admissions, and consequently that the plaintiff's solicitor knew the case would not be

(1) [1904] 1 I. R. 341. (2) *Ibid.* pp. 352, 353.

seriously contested by the defendants. He therefore came to the conclusion that a fee of £6 6*s.* for directing proofs was reasonable and proper.

Item 145 was a sum of £225 charged for instructions for brief on the motion for judgment, including attendances in endeavouring to obtain copy of rental, searching for conveyances to the purchasers of thirty-nine lots, perusing conveyances containing over 700 folios, and the original deeds, attendances, searching for certificates and orders in the Land Judge's and Chancery Offices, also at the Receivers' and Valuation Offices, identifying seven lots, correspondence, &c., perusing documents containing over 5000 folios, and tracing title of thirty-nine owners from 1869 to 1903.

The Taxing Officer allowed £50. The plaintiff, in her objections, contended that she was entitled to an allowance for the work under Order LXV., Rule 65 (3), under the special circumstances of the case, the importance of the matter, and the amount (£40,000) involved.

Items 158 to 165 comprised the costs of a third counsel and the fees paid to him. The Taxing Officer held that he would only allow two counsel, as the case was decided on motion for judgment on admissions and in default of defence, and he was satisfied on the facts before him, that there was no very special circumstance in the case requiring the attendance of a third counsel. The Taxing Officer allowed a senior and junior counsel, but refused to allow the costs of a second senior.

Items 275 to 282, amounting to £52 14*s.*, were instructions for notice, pursuant to the Chief Clerk's ruling, for service on the several defendants, calling on them, if they wished to object, to file affidavits in support of such objection; also for preparation of schedule to be laid before the Chief Clerk on the adjourned summons, including extracts from the affidavits of acreage, &c., and also intricate calculations which occupied the solicitor and two assistants for two days. The notice was intricate, and involved calculations on different bases, drafting sixteen copies, &c. The Taxing Officer allowed £13 13*s.* in respect of these items, holding that this sum adequately remunerated the solicitor for the work done. It appeared that in addition to this the solicitor

M. R. 1907.

ALLISON *v.* JENKINS.

was allowed £10 for perusal of affidavits. Item 379 was a fee of £3 3*s.* for instructions for brief on further consideration. The Taxing Officer disallowed the item, and held that the fee was not chargeable under the Schedule of fees at present in force. Items 426 to 429 were charges incurred in registering the action as *lis pendens* against the defendant, Sarah Treanor, and against nineteen other defendants. The Taxing Officer disallowed all the items, inasmuch as the action was not registered as *lis pendens* against all the defendants, and was apparently only registered against one defendant (1), and at a very late period after the order on further consideration, and also on the ground that no urgent necessity was shown him why at that period of the action it was necessary to register it as *lis pendens*. As to part I. of the bill of costs, item 337 was a charge of £21 0*s.* 2*d.*, paid to Mr. Hicks, a surveyor, for expenses in visiting the Bundoran estate, and making a report. He was engaged for seven or eight days. The Taxing Officer reduced the amount claimed by £6 2*s.* 8*d.* Item 640 of part I. was a charge of £2 19*s.* 8*d.* for wide-line copy draft statement of claim for settlement by senior counsel (179 folios). The Taxing Officer disallowed the amount on the ground that it was not properly chargeable against the defendants.

Herbert Wilson, K.C., and *Denning*, in support of the objections to taxation :—

This was a case of great difficulty and importance, requiring the greatest attention and trouble and preparation on the part of the solicitors to bring it to a successful conclusion. The Taxing Officer failed to appreciate the magnitude and complexity of the case, or the nature of the questions involved. His decision was not based on a thorough examination of the nature of the case. He has erred in a matter of principle. That being so, the Court will interfere: *Barry* v. *Spaight* (2); *Maconchy* v. *Bank of New Zealand* (3); *Robb* v. *Connor* (4); *Dyott* v. *Reade* (5).

(1) This was a mistake. The *lis pendens* was registered against all the defendants.

(2) [1904] 2 I. R. 478.

(3) [1900] 1 I. R. 22.

(4) I. R. 9 Eq. 373.

(5) 10 Ir. L. T. R. 110.

Item 145 is a charge of £225 on instructions for brief on hearing, and was a moderate one under the circumstances of the case, and should be allowed: *Rooney* v. *Langtry* (1).

As to instructions to advise as to reply. This was a proper case for counsel to advise in, and requiring consideration. There were thirteen defences filed. The fee should be allowed. The delivery of the amended defences was not the point at which the case ceased to be one of magnitude. As to item 85, the case for proofs had to be sent to senior counsel. It entailed the reading a case for proofs of 1000 folios, and the fee claimed is not immoderate. It should not have been reduced.

As to items 158 to 165. The fact that this case was decided on motion for judgment on admissions is no reason to cut down the number of counsel, since the questions to be determined were of the highest importance to the plaintiff and the defendants. There was a long argument, and many conflicting interests had to be considered. The property involved was considerable, and the questions arising for consideration were difficult to determine.

In *In re M'Iver* (2), where the costs of a third counsel were disallowed, no question of law was involved: *Thompson* v. *Bolton* (3). As to the registration as *lis pendens*, the Taxing Officer was under a mistake of fact. The case was registered as *lis pendens* against all the defendants. The registration was part of the solicitor's duty, and was necessary.

As to item 227, the allowance to the surveyor, Mr. Hicks, £21, should be allowed. The work was done, and the remuneration charged is not excessive, considering the circumstances of the case.

The other items claimed should be allowed.

P. A. O'C. White, for the defendants other than those specifically mentioned in the order of 16th March, 1904:—

On the general principle of the case the Taxing Master has exercised his discretion properly and reasonably, and therefore the Court will not interfere. He has not erred in any

(1) 31 L. R. Ir. 175. (2) 21 L. R. Ir. 241. (3) 22 Ir. L. T. R. 96.

M. R. 1907.

ALLISON v. JENKINS.

matter of principle. The costs have been liberally dealt with. The case up to a certain point was one of complexity, but presents no resemblance whatever to cases of such magnitude as *Maconchy* v. *Bank of New Zealand* (1), and *Dyott* v. *Reade* (2). It was tried on motion for judgment. For the allowance of three counsel no reason can be suggested, and they should not be allowed on such a proceeding; and no special reason for the Taxing Officer allowing three counsel has been shown, or for exercising his discretion in a way different from what he has done.

F. N. Greer, for the defendant, Margaret F. M'Crossan, on a question of her liability for costs, cited *Sykes* v. *Langrishe* (3).

THE MASTER OF THE ROLLS:—

I feel convinced that the Taxing Officer, while giving very great care and attention to the taxation of the plaintiff's costs, has overlooked certain features in the history of the case, and in consequence has underestimated the real nature of the difficulties that lay in the plaintiff's path. It is immaterial in what form of words the Court states the principles embodied in the judgment of Kenny, J., in *Barry* v. *Spaight* (4). The question is, Did the Taxing Officer, before dealing with the costs, before approaching particular items, take a true view of the case as a whole? If he did, and exercised his discretion, the Court would be slow to interfere. Now, I think the Taxing Officer overlooked the initial stages of this case. The care, trouble, and energy which Mr. Denning's firm took and expended so freely in the beginning made the ultimate proceedings appear comparatively simple; and the Taxing Officer was misled into believing that the difficulties which the plaintiff's solicitors considered great were in reality comparatively trivial. I take the statement of claim in this case. I observe that there are twenty-three pages of closely printed matter, and there is not a line in the twenty-three pages which, in my opinion, should have been omitted, and scarcely a para-

(1) [1900] 1 I. R. 22.
(2) 10 Ir. L. T. R. 110.
(3) 3 New Ir. Jur. 230.
(4) [1904] 2 I. R. 478.

graph which could have been inserted had it not been for the careful inquiries and patient investigations of plaintiff's solicitor.

The Master of the Rolls (Sir Andrew Porter), in giving judgment on further consideration of the Chief Clerk's certificate in the case (1), pointed out that there were three classes of defendants in the suit. First, the defendants Rafferty and Jenkins—"As to whom," he says, "I made a special order, declaring them entitled to their costs up to the date of the primary hearing, to be paid by the plaintiffs. They gave the plaintiffs every assistance in the matter, and are practically in the position of co-plaintiffs. They paid their proportion of the rent for which they were liable before action brought, and agreed to contribute all they were asked to contribute to make good the default of the other owners, and have paid into Court more than enough to satisfy all claims against them. . . . The next is the case of other defendants who have paid money into Court without previously having attempted to make any arrangement with the plaintiffs, as the defendants Jenkins and Rafferty did. They have admitted liability as regards the amount of contribution they were asked to pay, and in each case (save one, that of the defendant Scott) they have paid into Court more than the amount which they have been found liable to pay. As regards these defendants, they are bound to contribute to payment of the plaintiffs' costs up to the date of lodgment; they must abide their own costs after that date, and will be entitled on allocation to get back out of Court any money paid in excess of their liability. The third class consists of those defendants, including Scott, who have not paid into Court enough in respect of contribution, or have not paid in anything at all. How are they to be dealt with? They must pay their proportionate part of the plaintiffs' costs, including the costs of the defendants Rafferty and Jenkins, paid to them by the plaintiffs, pursuant to the judgment. These costs must be borne by them in proportion to the amount of contribution found by the Chief Clerk."

The decree contains a special provision, that the costs directed to be paid by the third class of defendants are to include the plaintiffs' miscellaneous costs, properly and necessarily incurred in

(1) [1904] 1 I. R. 341, at p. 351.

M. R. 1907.

ALLISON v. JENKINS.

respect of the matters of business mentioned in the affidavit of James A. Denning.

Now, from the affidavit of James A. Denning, filed on 10th March, 1904 (which is the affidavit referred to in the decree), as well as from the statement of claim, the defences of the various defendants, and the judgment of the Master of the Rolls on the primary hearing, I see that, in order to enable the plaintiff to start the suit with any hope of success, any prospect of ultimately recouping herself in respect of the large amount of money she had already paid, and of providing for the future, it was necessary to investigate the title of thirty-nine different persons to separate portions of the lands comprised in the fee-farm grant of 1855, and to trace their title down for a period of at least thirty years, with the penalty staring her in the face, that if she omitted to include in the list one person responsible for any part of the money paid by her, she ran the risk of defeat in the present, and uncertainty as regards the future.

Reading the documents I am able to appreciate the gravity of the case, and I do not wonder that the Master of the Rolls made a special order as to costs. A special order was, if I may say so with respect, necessary under the circumstances to do adequate justice between the plaintiff and the several defendants. I think the Taxing Officer has overlooked these facts. Mrs. Margaret Allison was regarded as one who had saved the property for herself and all others interested in the lands—one who was entitled to be treated by the defendants, not as a hostile plaintiff, but as one who had acted, and was acting, as a trustee; and the Master of the Rolls declared her entitled to be paid her costs, "including the plaintiff's miscellaneous costs, properly and necessarily incurred in respect of the matters of business mentioned in the said affidavit of the said James A. Denning."

The initial stages of the suit having been completed, the case came on to be heard on motion for judgment on admissions in the pleadings. This is the sole point in favour of the defendants' contention. I do not entertain any doubt that if it had not been for the great care taken in the earlier stages of the action it would have been impossible to have dealt with the case by way of motion for judgment: the matters in difference would have been fought

out on the trial of the action in the ordinary way. If that course had been taken, the fee for instructions for brief, so far from being cut down by the Taxing Officer, would, I apprehend, have been regarded as a moderate charge.

The case, in my opinion, was one of considerable magnitude. It raised interesting and novel questions of principle; it involved considerable property; it affected numerous persons; it meant a great deal to the plaintiff and also to each and every defendant. It resulted, as I have said, in a motion for judgment in a quiet, unostentatious way, all the pomp and circumstance of a trial being absent. Why? Because the plaintiff's solicitors had so stopped every possible avenue of escape that the defendants, especially those comprised in the third class, had to admit some liability, and to acknowledge that the issues in dispute were reduced to questions which could be tried out and decided by the Judge on motion for judgment, without the expense of a formal trial. Really, to cut down the plaintiff's costs in such a case would be like refusing to pay the fair price of an engine because it was admirably finished and put in perfect working order before delivery. I think it is a question of principle.

With every respect to the Taxing Officer, and recognizing the great care and anxiety on his part to do justice between the parties, I think I am bound to send the case back to him, with the suggestion that he should reconsider the items in part II. in the light of my opinion as to the difficulty and complexity of the proceedings; and that he should more especially reconsider item 145, bearing in mind that it is under this heading, in cases of the present description, that the solicitor looks for his fair remuneration.

I shall now refer to a few matters with a view to assisting the Taxing Officer, if I can, as regards items which he may fairly reconsider in addition to item 145.

Items 25 to 33 are those in which a charge was made for instructions to advise as to reply.

As to these items, the Taxing Officer has taken a view which I am not prepared to adopt without further explanation. Here we have a statement of claim of the nature and difficulty already alluded to. Thirteen defences were filed. What was the solicitor to do? He was bound, in my opinion, to send the case to counsel

M. R. 1907.

ALLISON v. JENKINS.

to advise. I cannot assent to the view that allowance on taxation of counsel's fee is to depend on the question whether he buys a printed form of joinder of issue and signs it; or, having carefully gone through every line of the defences, comes to the conclusion that the plaintiff is entitled to obtain relief on motion for judgment on admissions. If there is a case to advise, and counsel advises that there is no necessity to reply, the Taxing Officer says that counsel, having read all the defences, is not entitled to a fee; I do not assent to that proposition.

With regard to item 85. A case for proofs was sent to senior counsel. It is suggested that plaintiff's solicitors knew that the case was not *seriously* contested by the defendants. I cannot agree. Liability to contribute was admitted; but the method of ascertaining, and the extent of, the liability remained to be determined; and I ask the Taxing Officer to consider whether, in a case of the description I have indicated, senior counsel would have been adequately remunerated by payment of a fee of six guineas for reading a case for proofs of 1000 folios?

Again, as to item 158, there is the question as to the number of counsel to be allowed. If my view is right, the Taxing Officer should reconsider this question also. He is mistaken in thinking, if he did think, that there is nothing to be done on a motion for judgment. In some instances there is much to be done. In this case a principle had to be established: the basis on which contribution was to be made. The principle to be applied came up for discussion and decision. That the case was considered of some importance by the defendants is shown by the number of counsel retained, and by their arguments as reported. [His Lordship referred to the arguments (1).] I do not suggest that three counsel should be allowed in all cases where the defendants are numerous; but in the present case, where there were a number of defendants representing diverse interests, and presenting different views, I think it desirable for a plaintiff to be adequately represented by counsel, and I ask the Taxing Officer to deal with the item on that basis.

Item 269 has been absolutely disallowed. At first I was inclined to think that the Taxing Officer was wrong in this respect

(1) [1904] 1 I. R. 345, 346.

also, but there is this to be said :—If the Taxing Officer had allowed an adequate fee on instructions for brief, one might fairly say that this item was substantially covered by the earlier allowance (1).

As regards items 275–282, I think that when the Taxing Officer considers that the sum of thirteen guineas is really less than the amount the solicitor would be entitled to for copying the documents dealt with, he will see that some consideration is due to plaintiff's solicitors for the preparation of this schedule and notice. In taking the course they did, they enabled the Court to bring to a conclusion proceedings which might have been tied up for years if that course had not been taken. I think these items should be allowed to plaintiff's solicitor.

As to 379–384—instructions for brief on further consideration —I am told it is the practice not to allow costs for such instructions. But this is a very special case. The costs of the proceedings were reserved for the hearing on further consideration : that is not an immaterial matter. Serious questions arose ; and I confess if I had been counsel in the case I should have been surprised if the Chief Clerk's certificate had been thrown down before me without note or comment.

How could counsel in this case have been prepared for the discussion, which resulted in the special order as to costs, without receiving adequate instructions ?

As to item 426 and the following items, dealing with the registration of *lis pendens*, I will ask the Taxing Officer to reconsider these items, because I cannot leave out of consideration his reason for the disallowance. A *lis pendens* was registered in fact against each of nineteen defendants, and there is nothing in the point of delay. The Taxing Officer is under a mistake as to this. It was entered in each case in time to prevent injury ; and if the registration was not effected, as it was, the solicitor would have been guilty of dereliction of duty. The Taxing Officer is not justified in refusing to allow these items.

As to part I., the view taken by the Taxing Officer as to the liability of Mr. Greer's clients for a share of the costs is correct

(1) This item was not pressed by counsel for the plaintiff.

M. R. 1907.

ALLISON *v.* JENKINS.

and accurate. I think the limit of their responsibility is a limit as to time, and the order is not intended to throw the whole of the miscellaneous costs on the third class of defendants. Mr. Greer's clients are only to be responsible for their share of the costs until the time of the lodgment of the money in Court.

As to item 337, I allow £21 0*s.* 2*d.* paid to Mr. Hicks. The reduction is small, but the reduction was made under a misapprehension as regards the number of days actually devoted to the work. *Sykes* v. *Langrishe* (1) is not capable of being pushed to the length which Mr. Greer sought to push it in argument. The matter comes back to *Barry* v. *Spaight* (2), and for the work done the remuneration charged (considering the gravity and importance of the case and the necessity for accuracy), twenty guineas, seems a just fee.

Item 640 is a charge by plaintiff's solicitor for copy draft statement of claim for settlement by senior counsel. In a case of this description, in which the statement of claim is of such length and complexity, the solicitor should, in my opinion, be allowed the costs of a wide-line copy of the draft as settled by junior counsel, to send to senior counsel to revise. The objection should never have been made. I make that allowance.

R. W. I.

Appeal. June 5.

The defendants appealed (3).

Conner, *K.C.*, and *Jefferson*, *K.C.*, for the appellants.

Herbert Wilson, *K.C.*, and *F. F. Denning*, for the plaintiff.

SIR SAMUEL WALKER, C.:—

There are only two items in this bill of costs, so far as objected to, as to which the appeal fails, viz.: the item of £8 3*s.* 4*d.*, for registering the suit as a *lis pendens*, and the item for a case to

(1) 3 New Ir. Jur. 230. (2) [1904] 2 I. R. 478.

(3) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

counsel, to advise and settle a reply—for which a sum of £10 is by consent to be allowed. As to these two items, Mr. Conner fails; as to the other items he must succeed.

As to the other items—the principal one is No. 145, at which a sum of £225 was claimed for instructions for the brief, and the Taxing Master allowed £50. We have no jurisdiction to interfere with the exercise of his discretion by the Taxing Master with respect to the allowance under that head. There is no principle on which we could increase the sum which he has allowed; and the same reasoning applies to the amount allowed for the Schedule for the Chief Clerk's use, for which a sum of £52 14*s.* was claimed. The cost of printing the documents contained in it comes to less than £4, and the Taxing Master has allowed £13 13*s.* We see now that the Taxing Master has allowed a sum for perusing the affidavits, so that the solicitor would get a sum of £10 in addition to the £13 13*s.* for himself. It was an important item as to future stages of the action, and we see no reason to interfere with the ruling of the Taxing Master.

As to the cost of a third counsel, the action was heard on a motion for judgment on admissions in the pleadings on which only two counsel could be heard, and having read the report of this case in the Law Reports, we see no reason to interfere with the ruling of the Taxing Master on this item.

That applies *a fortiori* to the fee for instructions for the brief on further consideration. Item 73 of Part I. of Appendix S, shows that a fee for instructions for the brief on further consideration is not chargeable in the cases there mentioned, of which this is one.

As to the charge for copies of deeds and other documents sent to counsel, and instructions for statement of claim, it is not the practice to allow such items on taxation between party and party, and the note to item 113 of Part I. of Appendix S shows that the practice is right. The fee for drafting a statement of claim is intended to include a copy for settlement by counsel, and therefore the Taxing Master was right in disallowing the charge for a wide-lined copy of the statement of claim for settlement by senior counsel.

As to the fee on the case to direct proofs—£15 15*s.* was

Appeal. 1907.

ALLISON v. JENKINS.

Sir Samuel Walker, C.

claimed, and this was reduced by the Taxing Master to £6 6*s*. There is no principle on which we could interfere with the ruling of the Taxing Master as to that.

A sum of £21 was charged in the bill, for the work of a surveyor. The Taxing Master has reduced the amount to £15, because he allowed for three days' work instead of four. He is the proper person to decide how many days' work should be allowed in cases of this kind, and we decline to interfere.

Each party must abide their own costs of the hearing before the Master of the Rolls, but here Mr. Conner has succeeded substantially, and we think that he is entitled to his costs, which we measure at ten guineas.

FITZ GIBBON, L.J.:—

The most important question of principle on this appeal is as to the mode of dealing with the fee of £50, allowed for "Instructions for brief." In the cases referred to, *Barry* v. *Spaight* (1) and *Rooney* v. *Langtry* (2), different courses were adopted. In *Barry* v. *Spaight* (1) the case was merely sent back by the King's Bench to the Taxing Master for re-consideration; in the other case, Warren, J. had the courage of his convictions, reduced the sum allowed, and named the sum which he thought sufficient. I cannot think that a Court exercising appellate jurisdiction ought blindly to send back for re-consideration an item which is still left to the discretion of the inferior tribunal. If the amount is so excessive that it ought not to stand, where no question of principle is involved, the appellate Court ought to indicate how the discretion of the Taxing Master ought to have been exercised—in short, it ought to name the right amount. But where there has been a mistake of principle, the Court should declare the law and define the principle, and may then send the case back to the Taxing Officer with explicit directions on which he can act.

The main contention of the respondents here was that principle was violated in that the Taxing Officer had overlooked the difficulty and importance of the case. He cannot have done so,

(1) [1904] 2 I. R. 478. (2) 31 L. R. Ir. 175.

because the total amount of the taxed costs which he allowed was such as could only be payable in a difficult and important case—being at least £700. But the *normal* amount to be allowed for "Instructions for brief on hearing or trial of the action" is given in the Schedule, App. S, Part I., as "£1 11*s.* 6*d.*, or such further reasonable sum as the Taxing Master may on special grounds allow, *having regard to the nature and importance of the case*, but, unless ordered by the Court or a Judge, not to exceed £5." Here the Taxing Master gave £50—more than thirty-one times the normal fee and ten times the *maximum* fee, within his own authority—"having regard to the nature and importance of the case." Therefore, unless the Court can say, as Warren, J. did in *Rooney* v. *Langtry* (1), that the sum given was too large, and can say how much too large it is, sending it back will not be a conclusion of the matter.

But there is another point of principle, which I feel it to be my duty to mention. Perusals, attendances, *et cetera*, have been separately paid for, and the special fee for "Instructions for brief" is, in my opinion, not to be regarded as *extra* remuneration for *all the work done* in the action, but as a sum specially awarded to the solicitor for his personal trouble in making up the case, and for putting himself into a position to instruct counsel. The fee for that service may be a large one, but before it was introduced, the solicitor's remuneration was chiefly derived from the fees for perusals, scrivenery, attendances, and the like; none of these fees have been taken away, but the fee for "Instructions for brief" has been added to the items which, before its allowance, constituted the whole of the solicitor's pay for his work in the action. Regarding the £50 as the Taxing Officer's estimate of this *extra* pay, I can not substitute any other figure, because I have no jurisdiction to substitute my estimate for that of the Taxing Officer. There is no question of principle involved; the Taxing Officer is the authorized expert, and I am not; and in fixing £50 he was bound to take into account all the fees which had been allowed under other headings.

The same may be said about the £13 13*s.* allowed for the

(1) 31 L. R. Ir. 175.

Appeal. 1907.

ALLISON *v.* JENKINS.

Fitz Gibbon, L.J.

Schedule for the Chief Clerk's use, instead of £52 14*s.* which was claimed. This was not all that was given to the solicitor for preparing this Schedule. He was allowed £10 for reading affidavits, and he was paid for perusing and preparing all the materials, and some of this work was covered by the fee for "Instructions for brief." So he got a special fee of £50 for work for which he claimed £225, and he got £10 and £13 13*s.* for work for which he claimed £52 14*s.* We can not interfere with these allowances.

As to the case and fee to counsel for drafting a reply, it would be a misfortune if, after the defences were in, the solicitor for a plaintiff could not get the costs of sending a case to counsel to advise as to what should next be done, unless counsel advised the filing of a reply. It would be wrong to disallow the costs of consulting counsel merely because no reply was in fact filed, though the advice of counsel was properly, if not necessarily, taken as to whether it should be filed or not. The disallowance of the sum of £10 which Mr. Conner offered to take would be a premium upon advising unnecessary pleadings in other cases; and, in this case, the advice given was very useful.

The registration of the suit as a *lis pendens* was right, because the plaintiff's demand might otherwise have been displaced by a dealing with the property by any one or more of the defendants. The Taxing Master's disallowance was based on a misapprehension; he thought that the action had been registered against two defendants only, instead of against twenty.

As to the 6*s.* 8*d.* taxed off for looking for a will, the Taxing Master held that the search ought to have been made in the right office first. That was altogether for his discretion. Similarly, as to the cost of the survey and map, he held that three days work was sufficient instead of four; we have no jurisdiction to interfere with such rulings.

HOLMES, L.J.:—

When a Court is called upon to review the taxation of a bill of costs by a Taxing Master, it can only interfere when there is error in principle, or a mistake in fact, by the Taxing Master in his decision.

In the case before us there is one item in which there was a mistake in principle—the disallowance of the fee on the case sent to junior counsel to draft a reply. As a matter of fact, there was no reply delivered; but junior counsel suggested a better way of bringing the action to a hearing. It would be contrary to justice and right to disallow this fee merely because there was no reply, when a better course was adopted in consequence of the advice of counsel.

There is another item in which there was a mistake, partly in principle and partly in fact, namely, the charge relating to the registration of this suit as a *lis pendens*. The Taxing Master disallowed that item on two grounds—(1) there was a mistake as to the number of defendants against whom the registration was made—in that he was in error; and (2) he thought that, at the time at which it was registered, it was too late—that was a mistake in principle; for, though it might have been registered earlier, it was not too late to do so. These two items should, in my opinion, be allowed.

Now, as to the other items, there are one or two disallowances made by the Taxing Master with which we have no jurisdiction to interfere at all. But the substantial ground of the appeal to the Master of the Rolls was that, in dealing with a number of items, the Taxing Master mistook the gravity of the action, the nature of the case, and the work the solicitor would have to do in connexion with it. I cannot agree with the view of the Master of the Rolls on this point. The Taxing Master evidently considered this a grave and difficult case, and he showed that he appreciated its gravity by the large sums allowed by him in the costs generally, as well as in the costs as to which the Judge made a special order.

It is clear that the Taxing Master recognized that he was taxing a very special sort of case. It may be that some minds might think that he was giving too much, others that he was giving too little; but there is no reason for interfering with his discretion.

Solicitors for the plaintiff: *Hoey & Denning.*
Solicitor for the defendants: *Keating.*

R. D. M.

Barton, J.
1907.
July 6, 18.

MUNRO *v.* HENDERSON.

(1907. No. 465.)

Will—Construction—Supplying words from context.

A testator left his property for life to A., with a power of appointment in case of her death unmarried or without issue. There was no gift over in default of appointment; but the power of appointment was given "subject as hereinafter set forth," and in a later clause the testator provided "that in the event of my said daughter, under the circumstances before detailed, in case of non-marriage or no issue living at the time of her decease," all his property was to go to certain persons named:—

Held, that it was clear that some word or words was or were omitted in the latter clause which provided for the event of the daughter doing, or not doing, something, but did not say what, and that the Court should supply the words "failing to exercise the said power of appointment," in order to effectuate the testator's intention which had been imperfectly expressed, but was to be gathered from the context and the whole will.

ORIGINATING SUMMONS.

Application on behalf of Samuel Munro for the determination of the following questions:—

1. Is the plaintiff, Samuel Munro, as the sole surviving child of deceased's brother, William Munro, entitled, under the will of the deceased John Munro, or otherwise, to the stocks and securities now representing the deceased's estate?

2. Had Anna Maria Neely, under the will of deceased, a general power of appointment over the deceased's estate, unfettered by any trust?

By his will, bearing date 31st January, 1861, John Munro bequeathed all his estate to trustees, upon trust to allow his daughter, Anna Maria Neely, to receive the rents and profits during her life, and "in the event of my said daughter dying unmarried, or, if married, without any issue her surviving, and subject as hereinbefore and hereinafter set forth, and to the uses herein contained, upon trust and to the use of such person or persons as my said daughter shall by deed or will, to be duly executed

in the presence of two subscribing witnesses, direct or appoint. . . . I hereby nominate and appoint Snowdon Corkin and Matthew Johnson Smyth executors and trustees of this my last will and testament, and am sure, from the friendship there has always existed between us, they will see my wishes carried out as hereinbefore set forth; and, in pursuance of my wishes and intentions, which they are aware of, my will is that, in the event of my said daughter, under the circumstances before detailed, in case of non-marriage or no issue living at the time of her decease, that all my said real, freehold, and personal properties, and estates and securities, shall go and be distributed, after being converted into cash, amongst the children of my brother William, share and share alike."

The said Anna Maria Neely died a widow, without issue, on 8th February, 1907, having by her will, dated 6th December, 1906, exercised the power of appointment contained in the will of 31st January, 1861.

M'Ilroy, K.C., and *John M'Gonigal*, for the plaintiff, contended that the latter part of the will was inconsistent with the power of appointment contained in the former part, and that therefore the provision in the former part could not stand. There was here shown a change of intention, and the posterior clause must prevail: Jarman on Wills, p. 436; *Crone* v. *Odell* (1); *Ulrich* v. *Litchfield* (2); *Morrall* v. *Sutton* (3); *Maher* v. *Maher* (4).

Bates, K.C., for the executors of the will of Anna Maria Neely, submitted that it was plain there was in the latter provision an omission which the Court had power to supply. The intention was to provide what was to happen if Anna Maria Neely failed to appoint, and so read there was no inconsistency between the provisions. It was the rule not to disturb the prior devise further than was necessary for giving effect to the posterior disposition: Jarman on Wills, p. 438.

(1) 1 Ba. & B. 449.
(2) 2 Atk. 372.
(3) 4 Beav. 478.
(4) 1 L. R. Ir. 22.

Barton, J.
1907.
MUNRO
v.
HENDERSON.

S. L. Brown, K.C., and *C. Murphy*, for the appointees under the will of Anna Maria Neely :—

To revoke the prior provision the posterior provision must be equally unequivocal. In this case the posterior provision must be rejected as unintelligible, or the Court should read in words which would make it intelligible and carry out the testator's intention: *Home* v. *Pillans* (1); *Abbott* v. *Middleton* (2); Hawkins on Wills, p. 3.

Andrews, for the defendants, the existing trustees of the will of John Munro.

M'Ilroy, K.C., in reply, contended that, if any word or words were to be supplied, the word to be supplied was "dying."

July 18.

BARTON, J. :—

Mr. M'Ilroy, in opening this case, contended that it was a case of two contradictory and irreconcilable provisions in a will, the latter of which should, according to the general rule, prevail. That general rule is subject to the qualifications that a prior bequest should not be disturbed further than is necessary for the purpose of giving effect to the later disposition, and that the whole will should be reconciled, if possible. I think, however, that the case is not quite a case of that class. In the present case it is clear that there is in the later clause an omission of some word or words. The clause provides for what is to happen "in the event of my said daughter, under the circumstances before detailed, in case of non-marriage, or no issue living at the time of her decease." It is evident that there is a hiatus. The clause provides for what is to happen in the event of his daughter, under certain circumstances, doing or not doing something; but the clause does not say what. Accordingly, it is a case in which the testator has not completely expressed his meaning; and the question arises whether the Court can supply some word or words in order to effectuate his intention, as collected from the context. The whole will and the context clearly indicate, in my opinion,

(1) 2 My. & K. 15, at p. 25. (2) 7 H. L. Cas. 68.

that the omitted words are "failing to exercise the said power of appointment," or words to that effect. The original bequest omitted to provide for that event, but the power of appointment was given, "subject as hereinafter set forth." The subsequent clause refers back to the prior bequest by the words "under the circumstances before detailed." It is clear, I think, that it is not a case of a testator changing his mind in the course of the will, but that the two clauses refer to and supplement each other. They are divided by a clause appointing executors and trustees, accompanied by a special direction to them to carry out his wishes "hereinbefore set forth." I have inspected the original will, but it throws no light on the case. It is not a holograph; it is written in a clerkly hand. It is evident that the person who copied or took it down left out some words. I think that this was practically conceded at the end of the argument. Indeed, counsel for the plaintiff said that if any word or words were to be supplied, it should be the word "dying." If I have to choose between supplying the word "dying," which makes the two clauses contradictory, or the words "failing to exercise the said power of appointment," which reconciles the two clauses, and renders the whole will consistent, I have no difficulty in choosing the latter alternative. The context and the cross-references to each other in the two clauses justify the Court, in my opinion, in supplying the words which I have mentioned for the purpose of effectuating the intention which was imperfectly expressed, but can be gathered from the context and from the rest of the will.

Solicitor for the plaintiff: *David M'Gonigal.*

Solicitors for the executors of the will of Anna Maria Neely: *Johns, Bates, & Johns.*

Solicitor for the appointees under the will of Anna Maria Neely: *T. B. Wallace.*

Solicitors for the defendants, the trustees of the will of John Munro: *Johns, Bates, & Johns.*

W. M'G.

Land Judge's Court.
Madden, J.
1907.

May 14.
June 29.

In the MATTER of THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, and of MICHAEL FREEMAN, an Owner of Land.

Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 54—*Resale to owner of estate of land purchased by Land Commission from owner—Restrictions on incumbrances.*

Section 54 of the Irish Land Act, 1903, which contains restrictions on subdivision and incumbrance of holdings, for the purchase of which an advance has been made by the Land Commission, does not apply to lands repurchased by an owner under section 3 of the Act.

Question of Law referred to the Court by the Central Registering Authority under section 14, sub-sect. 2, of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66).

Michael Freeman being the owner of an estate, by undertaking dated 3rd November, 1905, undertook to purchase from the Irish Land Commission his demesne under section 3 of the Irish Land Act, 1903, and, by vesting order dated 26th July, 1906, the Land Commission vested the demesne in him subject to the repayment of an advance of £4754 by an annuity of £154 10*s* 2*d*.

By deed dated 7th July, 1906, Michael Freeman charged the lands with a life annuity of £30 in favour of Margaret Farrelly. By deed dated 22nd March, 1907, Michael Freeman mortgaged the said lands to the Hibernian Bank to secure £5000 and interest. The total capital amount of Margaret Farrelly's life annuity and the Hibernian Bank's charge far exceeded ten times the purchase annuity; but it was submitted to the Registering Authority that the restrictions in sect. 54 (3) of the Irish Land Act, 1903, were not applicable to the case. It appeared that Michael Freeman was now an arranging debtor.

The question for the decision of the Court was, whether section 54 of the Irish Land Act, 1903, applies to lands repurchased by an owner under section 3 of the said Act.

Land Judge's Court.
Madden, J.
1907.

In re FREEMAN.

H. Wilson, K.C., for the Hibernian Bank, Limited:—

Section 54 of the Irish Land Act, 1903, applies only to "holding." The word "holding" is used twenty-two times in the section, and implies that the relation of landlord and tenant exists, or has existed, in land: see definition in section 57 of the Land Law (Ireland) Act, 1881. Section 3 (2) of the Land Act, 1903, shows that a "holding" is something else than a "parcel of land." In section 3 (1) the expression "land" is used in respect of portion of an estate repurchased by the owner, where the estate has been sold to persons other than the Land Commission. The expression "parcel of an estate" is used (sect. 3 (2)) where the owner repurchases (*a*) in the case of a sale to the Estates Commissioners, (*b*) in the case of a sale by the Land Judge under section 7. The policy of the Act was to prevent tenant purchasers from sub-dividing or incumbering the land purchased by them to such an extent as to be unworkable.

S. L. Brown, K.C., for the assignees in bankruptcy of Michael Freeman:—

Section 54 was enacted for the protection of the Land Commission, and to give the Land Commission a better security against the proprietor. Before this section comes into operation there has long ceased to be a "holding." The word "holding" in this section is synonymous with "parcel of land."

MADDEN, J.:—

June 29.

As the question involved in this case is of general importance, I reserved it for consideration, although it never presented any difficulty to my mind. The general policy of the Land Purchase Code is to enable occupying tenants, by means of an advance of public money, to become the purchasers of their holdings. Upon this Code there has been engrafted by the Act of 1903 (sect. 3) a provision of an exceptional character by which the owner of an estate, partly in the occupation of tenants and partly in his own occupation, may, by means of a sale to the Land Commission and a resale to the owner, remain in possession of the untenanted portion of his estate; and for the purpose of carrying out this arrangement an advance of public money may be made "not

Land Judge's Court.
Madden, J.
1907.

In re FREEMAN.

exceeding in any case one-third of the aggregate amount of the purchase-money of the holdings and other parcels of land comprised in the estate or twenty thousand pounds, whichever is the less." This advance is made under the Land Purchase Acts and is repayable in a similar manner as advances made on the purchase of their holdings by occupying tenants. The question in the present case is whether the provisions of the 54th section of the Act of 1903 apply, as between the Land Commission and a repurchaser of untenanted lands. A comparison of the two sections will show plainly that this cannot be so. Section 54 deals with the proprietor for the time being of any "holding." A holding is defined to be, during the continuation of a tenancy, land held under the tenancy; and on the determination of the tenancy, the same parcel of land discharged from the tenancy; including under the last-quoted words the "holdings" purchased by the tenants and governed by the 54th section of the Act of 1903. Again, the whole of this section assumes that the "holding" is registered under the compulsory provisions of the Local Registration of Title (Ireland) Act, 1891. The 3rd section (sub-section 6) of the Act of 1903 exempts lands repurchased under its provisions from the provisions of the Act of 1891 relating to the devolution of freehold registered land. The provisions of the 54th section are obviously inapplicable to repurchased estates in possession which may in certain conditions, not very clearly defined, become subject to the provisions of an antecedent settlement. On the question before me the Legislature is explicit, and the distinction is clearly taken between a holding which had been the subject of a tenancy and untenanted land in the occupation of the owner.

Solicitors for the Hibernian Bank, Limited: *D. & T. Fitzgerald.*

Solicitor for the assignees in bankruptcy of Michael Freeman: *J. J. Lynch.*

D. M. S.

IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND OF DAVIDSON PURVIS, A REGISTERED OWNER OF LAND; AND IN THE MATTER OF THE APPLICATION OF WM. M'DANIEL.

Land Judge's Court.
Madden, J.
1907.
May 14.
June 29.

Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict.* c. 66), *s.* 29—*Land registered subject to rights or equities—Ascertainment of burdens.*

Where the title of a tenant purchaser is registered under the provisions of the Local Registration of Title Act, 1891, "subject to equities," and where, on the application of the registered owner, the Registering Authority, under sect. 29 (4) of the Act, ascertains and enters on the register burdens created by such a tenant purchaser prior to the acquisition by him of the fee-simple, those burdens affect the fee-simple; and the powers of the owners of those burdens, including the power of sale of a mortgagee, will operate on the fee-simple.

QUESTION OF LAW referred to the Court by the central Registering Authority under section 14, sub-sect. 2, of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66).

Davidson Purvis then being the occupying tenant of the lands entered on folio No. 1767 of the register, county of Tyrone, by indenture dated 24th December, 1896, mortgaged the said lands to David Anderson & Son and the Cookstown Loan Company, Limited, to secure £250 and future advances with interest; and the said indenture was duly registered in the Registry of Deeds on 29th December, 1896.

By a vesting order of the Land Commission, dated 26th July, 1898, Davidson Purvis acquired the fee-simple of the lands under the Land Purchase (Ireland) Acts, subject to the payment of an annuity to the Irish Land Commission in respect thereof.

On 29th December, 1898, Davidson Purvis was, pursuant to the Local Registration of Title (Ireland) Act, 1891, registered as owner in fee of the said lands in the Local Registration of Title Office, county of Tyrone, folio 1767, subject to the rights or equities (if any) arising from the interest vested in him by the vesting order of the Land Commission, being deemed to be

Land Judge's Court.
Madden, J.
1907.

In re PURVIS.

a graft on his previous interest in the land, or arising in any other manner from the existence of such previous interest.

David Anderson & Son and the Cookstown Loan Company, Limited, as first mortgagees, in exercise of their power of sale under their mortgage, caused the said lands amongst others to be put up for sale by public auction on 7th February, 1900, and William M'Daniel, being the highest bidder, was declared the purchaser thereof at £250.

On 9th February, 1900, a charge in favour of Mary Ann Hughes, of Inneval, in the county of Tyrone, was registered on the said folio to secure £65 and interest at £5 per cent.

By indenture dated 5th July, 1901, between David Anderson & Son and the Cookstown Loan Company of the first part, Davidson Purvis of the second part, and William M'Daniel of the third part, David Anderson & Son and the Cookstown Loan Company as mortgagees, in exercise of their power of sale, conveyed the lands to William M'Daniel, to hold to him, his executors, administrators, and assigns, and Davidson Purvis, as beneficial owner, conveyed the lands to William M'Daniel to hold in fee-simple.

William M'Daniel filed an application to discharge the equities, and to be registered as full owner of the lands, subject only to the annuity in favour of the Irish Land Commission; but the Registering Authority refused to comply therewith unless and until a release or receipt was obtained from Mary Ann Hughes, and her certificate of charge lodged.

The question for the decision of the Court was whether, having regard to the fact that the mortgage of 24th December, 1896, affected only the former tenancy in the lands, the deed of 5th July, 1901, was sufficient to convey the lands to William M'Daniel, discharged from the charge in favour of Mary Ann Hughes, which was registered as affecting the fee-simple.

J. R. Raphael, for William M'Daniel, referred to section 8, Purchase of Land (Ireland) Act, 1885 (48 & 49 Vict. c. 73); sect. 14, Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33); Cherry's Land Acts, pp. 377, 1058.

Charles Droomgoole, for the chargeant, Mary Ann Donaghy or Hughes, cited *In re Hodson and Howes' Contract* (1).

(1) 35 Ch. D. 668.

Land Judge's Court.
Madden, J.
1907.
In re PURVIS.
June 29.

MADDEN, J.:—

In this case the tenant purchaser availed himself of the 2nd and 3rd sub-sections of section 29 of the Local Registration of Title (Ireland) Act, 1891, and the registration was made expressly "subject to any rights or equities arising from the interest vested in the purchaser being deemed to be a graft on his previous interest in the land, or arising in any other manner from the existence of such previous interest." I have in former cases expressed my regret that tenant purchasers, from unwillingness to incur trifling expense and trouble, have converted into a general rule what was plainly intended to be an exceptional provision for cases of special difficulty. The result is that a subsequent purchaser is involved in the investigation of title antecedent to, and independent of, the entry upon the register. The section contains a provision which, I am happy to say, is being largely taken advantage of, by which the registered owner is empowered at any time to apply to the Registering Authority to ascertain and enter on the register any burdens the ascertainment of which may have been dispensed with; and the Registering Authority is directed thereupon to ascertain and enter such burdens on the register. In the present case the interest of the purchasing tenant was subject to a mortgage. If the equities had been ascertained at the time of registration, this mortgage would have been, as a matter of course, entered on the register as a burden on the registered land, and all the powers of the mortgagee, including the power of sale, would have operated on the registered interest, that is to say, the fee-simple. This was not done, and the registered owner created a charge by way of annuity which has been duly registered as a burden. The mortgagee, in exercise of his power of sale, has sold to a purchaser; and the registered owner has joined in the conveyance. The purchaser in this case has lodged an application, with the privity of his vendor, to be entered on the register, and also to have the equities discharged, and the completion of the register awaits the discharge of the equities, subject to which the purchaser's registration could have been at once completed. I have therefore before me an application under section 29 (sub-section 4) to have the burdens which

Land Judge's Court.
Madden, J.
1907.

In re PURVIS.

were dispensed with under sub-sections 2 and 3, ascertained and entered on the register, on behalf of vendor and purchaser, one of whom is on, and the other entitled to be placed on, the register, in accordance with his application to that effect. Mr. Dromgoole, who appears for the annuitant, contends that the rights of the mortgagee can only be ascertained by substantive proceedings in equity, in which his client should be a defendant. His case rests upon the proposition that the intervention of a registered burden between first registration and an application by the registered owner to discharge equities, renders it impossible for sub-s. 4 to be put into operation unless with the consent of the owner of the registered burden. In the absence of such consent a suit in equity would be necessary in every case, even when (as in the present instance) the registered owner admits the antecedent equity. I cannot adopt this construction of the section. The words are, "the registered owner may at any time apply." Any person dealing with the owner of an estate in land registered subject to equities does so, in my opinion, subject to the right of the registered owner at any time to have those equities ascertained and entered on the register. If he does not wish to take this risk, he can insist on the registered owner applying to have the equities discharged. In several cases, I have been compelled to leave claimants under unregistered equities to assert their rights by substantive proceedings before a Court of competent jurisdiction, where the alleged equity is disputed by the registered owner. The Registering Authority has, in my opinion, jurisdiction to ascertain and enter on the register the burdens the ascertainment of which was dispensed with at first registration. They will, of course, be entered as burdens affecting the registered interest, that is the fee-simple. Should any question arise on the ascertainment of these burdens, it can be brought before me in the usual way.

Solicitors for William M'Daniel: *J. B. & R. H. Twigg.*
Solicitor for Mary Ann Donaghy: *W. J. Reynolds.*

D. M. S.

BOWMAN *v.* HILL (1).

Appeal, 1907.

June 2–4, 7.

Church buildings—Presbyterian church—Lease of premises on which church is built to trustees for the congregation—Advances to complete building of church—Lien on Church property—Decree for sale.

A congregation, in accordance with the Laws and Constitution of the Presbyterian Church of Ireland, was formed in 1897, at Bangor, in the county of Down, and they proceeded to build a church and manse. A lease was made of ground suitable for the building on the 12th December, 1899, to J. B., S. G. M., J. N., and J. M., for 999 years, upon trust for the congregation, so long as the same should remain under the jurisdiction of the General Assembly of the said Church, and profess and maintain the doctrines of the Westminster Confession of Faith.

The building had been proceeded with, and the church was opened in September, 1899. A large amount of money had been subscribed from time to time to pay for the building of the church and the manse; but a further sum being required, the Board of Deacons at a meeting on the 30th May, 1900, approved of an overdraft from the bank for £4000, and appointed the plaintiffs, J. B. and H. B., and the defendants, S. G. M., J N., and J. M., to act as guarantors on behalf of the congregation. The guarantee was given, and payments had been made to the bank in reduction of the overdraft, leaving a balance of £2726 due. The plaintiffs were obliged to pay this amount. The three defendants, S. G. M., J. N., and J. M., paid to the plaintiffs their proportion, leaving £1090 to be borne by the plaintiffs. This debt was treated as a congregational debt in the annual accounts of the Church property.

J. B. and H. B. brought an action against the Board of Deacons, and the trustees for the congregation, to raise the amount by a sale of, and receiver over, the property comprised in the lease of the 12th December, 1899:—

Held (reversing the decision of Barton, J.), that a Court of Equity would not enforce payment, by sale, of property the subject of a trust, when such proceedings would destroy the trust.

ON the 15th January, 1897, the plaintiffs, James and Henry Bowman, convened a meeting at Bangor, in the county of Down, for the purpose of forming a third congregation of the Presbyterian Church in the town, and building a church for their

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1907.

BOWMAN v. HILL.

accommodation. There were already two churches; but it was stated that these were unduly crowded, especially in summer, and a necessity had arisen for a third.

On the 22nd January, 1897, a public meeting was held, at which a general committee was formed, consisting of S. Montgomery, J. Neill, J. Smythe, H. M'Roberts, J. M'Meekan, J. Beatty, J. Lorimer, and the plaintiffs, James and Henry Bowman.

On the 17th March, 1897, it was resolved at a public meeting to present a memorial to the Presbytery of Ards to form them into a congregation. On the 13th April the Ards Presbytery and Synod of Belfast granted the prayer of the memorial, and it was sent forward to the General Assembly.

At a meeting on the 19th May a site for the church at Hamilton Road, Bangor, was selected; and it was agreed to accept a lease of the ground for 999 years, at £20 a year; and it was resolved that a sum of £2000, "or thereabouts," be expended on the building of the church. It was resolved that the form of the new church should be elliptical, and that it should be built of brick, or Scrabo stone.

On the 30th May, S. Montgomery, James Neill, John M'Meekan, and James Bowman were appointed trustees for the church. At a meeting of the committee on the 15th September, 1897, a plan for the church was selected, which was to be retained for some time, in order that the members of the congregation might examine it.

On the 8th June, 1897, the General Assembly granted the prayer of the memorial, and it was remitted to the Presbytery of Ards to form a congregation. On the 11th June the Presbytery erected the memorialists into a congregation, and appointed an *interim* session. From and after that the minister and ruling elders were the governing body so far as spiritual matters were concerned, and the temporal matters were handed over to the Board of Deacons; but the Board of Deacons was not formed until May, 1899 (1).

(1) The Clauses in the Constitution and Government of the Presbyterian Church in Ireland, referred to in the case, are as follows:—

Article 193. The Board of Deacons consists of the members of the Session

On the 2nd March, 1898, at a meeting of the building committee, it was resolved that the tender of one Colville, for £3715 for building the fabric of the church, should be accepted; and, on Colville subsequently getting into financial difficulties, a fresh contract was entered into with M'Loughlin & Harvey to complete the buildings for £3200.

The church was built, and opened in September, 1899. The lease of the premises on which the church was erected, made in pursuance of the 13 & 14 Vict. c. 28, was dated the 12th December, 1899, and was made between Robert E. Ward of the one part, and John M'Meekan, James Neill, S. G. Montgomery, and

and the deacons of the congregation, and to it are entrusted the care of the poor and the temporal affairs of the congregation.

194. The temporal affairs of the congregation include all matters connected with its income and expenditure; the purchase, care, and sale of the Church property; the management of the graveyard, and the erection, repair, and renewal of the buildings belonging to the congregation. No monument shall be erected in a graveyard, or inscription be put on any monument, of which the Board of Deacons disapproves.

206. The lease and trust-deed of every church, manse, and school-house, or of site for the same, or of glebe in connexion with the congregation, shall, before being executed, be submitted by the Board of Deacons to the Presbytery of the bounds, and shall not be executed without the approval of the Presbytery. [Cf. Paragraph 339.]

207. When any sale or leasing of a church edifice, manse, school-house, or glebe, or change of site of church or manse, is contemplated, the matter shall be reported to the Presbytery, and the Board of Deacons shall act under its advice and control. A name shall not be assumed by a congregation, or the name of a congregation be altered, without the leave of the General Assembly.

226. A meeting of the congregation is called from the pulpit by the authority of the Session. It may be called to consider the state of religion, promote the cause of missions or Sabbath schools, or otherwise advance the Lord's work; choose ruling elders or deacons, or members of the Congregational Committee; receive reports from the Session, Board of Deacons, or Sabbath schools; appoint auditors of the congregational accounts, memorialize the courts of the Church or the civil authorities, and appoint commissioners to act on its behalf, and to support its memorials; authorize the purchase or sale of lands, or the purchase, erection, or sale of buildings for the congregation; approve of site for the church, manse, or school-house, or of proposed alterations of the same; contribute, or authorize the raising of funds for congregational or other religious or charitable objects; appoint or accept the resignation

Appeal. 1907.

BOWMAN *v.* HILL.

James Bowman (as trustees for the congregation) of the other part, for 999 years, subject to the rent of £20 a year; and the *habendum* of the lease was to these four trustees, or their successors in office, "upon trust for the said congregation, so long as the same shall remain under the jurisdiction of the said General Assembly, and shall profess and maintain the doctrines contained in the Confession of Faith and the Catechisms, Larger and Shorter, compiled by the Assembly of Divines at Westminster, and for such persons, members of the said congregation for the time being, as shall remain under or acknowledge such jurisdiction, and profess and maintain such doctrines." The lease contained a covenant to

of trustees of the congregational property, or for such other Christian objects as the Session may determine.

229. No purchase, leasing, or sale of Church property, or selection of site of church or manse, or erection of new buildings on congregational property, shall be made without the approval of the congregation, convened to consider the matter after at least a week's notice, and without the sanction of the Presbytery.

234. The trustees of every house of worship, school-house, or other building, or of any graveyard, belonging to the congregation, shall hold the same for the members of the congregation in connexion with the General Assembly professing the doctrines contained in the Confession of Faith, and the Catechism, Larger and Shorter, compiled by the Assembly of Divines at Westminster; and such creation or declaration of trust shall be either embodied in the lease of the building or graveyard, or expressed in a separate deed.

241. The trustees for the congregation should have all its title-deeds and securities deposited in the muniment room of the General Assembly, and should give copies of all such deeds and securities to the Board of Deacons, to be retained among its records. (For Rules and Preservation of Documents in Muniment Room of General Assembly, and for access to such documents, see Appendix xv, pp. 209, 210.)

339. The Presbytery shall see that every new lease, or assignment of lease, for any property of a congregation be drawn in accordance with the draft Forms and Precedents given in the Appendix, and that there be in the lease or assignment, or in a separate declaration of trust, words securing such property to the congregation in connexion with the General Assembly of the Presbyterian Church in Ireland professing the doctrines contained in the Confession of Faith and the Catechisms, Larger and Shorter, compiled by the Assembly of Divines at Westminster, and, in the case of a manse or glebe, stating also that it is given or held for the benefit of the minister of the congregation. (For draft Forms and Precedents, see Appendix viii, pp. 185–190.)

expend the sum of £4000, at least, in building a church and manse on the premises; a covenant not to carry on any trade or business on the premises; and a covenant not to allow any building to be erected on the demised premises to be used otherwise than for the purposes for which the lease had been expressed to have been granted. A sum of about £3500 had been subscribed towards payment of the building the church and the manse; but the total cost of the buildings amounted to about £8000.

An account had been opened in the Bank of Ireland on which James Neill and James Bowman were authorized to sign cheques. They had already, in May, 1900, obtained £3000 from the bank, and they required another £1000 to complete the building. On the 30th May, 1900, at a meeting of the Board of Deacons, it was resolved that the board approved of and accepted a further overdraft from the Bank of Ireland of £1000, making the total overdraft from the bank £4000, and they appointed the plaintiffs, James and Henry Bowman, and the defendants, Samuel G. Montgomery, James Neill, and John M'Meekan, to act on behalf of the congregation as guarantors to the bank for that amount. The guarantee had been signed on the 14th May, 1900.

On the 22nd July, 1904, the plaintiffs were compelled to pay to the bank the sum of £2706 0*s.* 2*d.*, then due to the bank on foot of the said guarantee. The defendants, Samuel G. Montgomery, James Neill, and John M'Meekan, repaid to the plaintiffs £1635 12*s.*, portion of the sum of £2726 0*s.* 2*d.*, leaving £1090 8*s.* 2*d.* of the said sum due to the plaintiffs. The debt had been treated as a congregational debt in the annual accounts of the Church property. The plaintiffs had frequently called on the Board of Deacons to pay the said sum of £1090 8*s.* 2*d.*, but had been unable to obtain payment.

On the 26th September, 1905, James and Henry Bowman brought this action against the Rev. Wm. Hill, S. G. Montgomery, James Neill, John M'Meekan, John Smyth, Henry Baxter, Thomas Bell, James Campbell, John Lorimer, and Hans M'Roberts, asking for a declaration—

"That the plaintiffs were entitled to a lien on the building known as the Hamilton Road Presbyterian Church, Bangor, and all other the property of the said congregation, for the amount found due to them.

Appeal.
1907.

BOWMAN
v.
HILL.

and that the said lien may be enforced by appointing a receiver over the said building, or by sale of the said building, and by sale of all other the property of the said congregation; and

That, in case of deficiency after the said sale, such of the defendants as should be found not to have contributed their full proportion of the amounts paid by the plaintiffs and the three defendants, S. G. Montgomery, John M'Meekan, and James Neill, may be ordered to pay to the plaintiffs their proportion.

The defendants Montgomery, M'Meekan, and Neill, were sued personally, and as trustees for the congregation, and the other defendants personally and as members of the Board of Deacons.

The defendants by their defence denied that the congregation authorized the guarantee to the bank, and they stated that no meeting was called to consider the same, and that no resolution was passed by the said Board of Deacons in reference to the said guarantee of the said sum of £4000 until the 30th May, 1900.

The trustees for the congregation further pleaded that, so far as the Board of Deacons, by the resolution of the 30th May, 1900, purported to act on behalf of the congregation, the said resolution was *ultra vires*. They further pleaded that by the lease of the 12th December, 1899, it was provided that the premises should be held in trust for the congregation so long as the same should remain under the jurisdiction of the General Assembly of the Presbyterian Church in Ireland, and that neither the Board of Deacons nor anyone else had power to charge or incumber the premises, or do any act whereby they might cease to be used for the purposes for which they were demised by the lease.

On the 20th July, 1906, Barton, J., gave judgment in favour of the plaintiffs. By the decree it was referred to Chambers for an inquiry whether all or any, and if so what, portion of the sum of £2726 paid to the Bank of Ireland on the 22nd July, 1904, on foot of the guarantee dated the 14th May, 1900, was expended upon the premises comprised in the lease dated 12th December, 1899, and made to the plaintiff, James Bowman, and to the defendants, S. G. Montgomery, James Neill, and John M'Meekan, as trustees for the congregation of the Hamilton Road Presbyterian Church, Bangor, Co. Down, in building, improving, or altering the said church, or in acquiring and providing fittings, furniture,

1907.

BOWMAN v. HILL.

and other requisites and accessories for the same; and the Court declared that the plaintiffs were entitled to a lien or charge upon the premises comprised in the lease of the 12th December, 1899, and upon the buildings erected thereon, known as the Hamilton Road Presbyterian Church, and upon the furniture, fittings, requisites, and accessories for same, which were acquired or provided with the moneys so paid under the said guarantee as aforesaid, to the extent of an amount equal to two-fifths of the sum which might be certified as the result of the said inquiry; and the Court ordered that, in default of payment to the plaintiffs of the said amount and costs, the plaintiffs be at liberty to apply to have the church and premises comprised in the lease of the 12th December, 1899, sold for the purpose of paying their demand and costs; and the Court adjourned the question of the personal liability of the defendants to make good any loss sustained by the plaintiffs on foot of the said guarantee.

From this decision the defendants appealed.

S. L. Brown, K.C., *Herbert Wilson, K.C.*, and *Hanna*, for the appellants:—

This was a religious charity, and a Court of Equity will not give relief to a person who has advanced money for the trust, where, by granting such relief, the trust would be destroyed altogether: *Darke* v. *Williamson* (1). If people in building a church spend more money than they intended, they cannot get their money back in a way which will prevent the building being used as a church. No such thing as a charge or lien was ever contemplated by the parties to this trust. There was no authority from the Board of Deacons or the congregation to enter into a guarantee. The sale of the church and other property in this case would be against the trusts contained in the lease of the premises, and also against Articles 226 and 229 of the Laws of the Presbyterian Church of Ireland.

The decision of the Court below was based on the decision in *Minnitt* v. *Lord Talbot de Malahide* (2). That was the case of a club, in which some of the members who had guaranteed the

(1) 25 Beav. 622.

(2) 1 L. R. Ir. 143; 7 L. R. Ir. 407.

Appeal. 1907. ROWMAN v. HILL.

repayment of money borrowed for the club sought to be indemnified out of the property of the club and also by the members personally. Sullivan, M.R., decided that they were so entitled, on the principle stated in *Bristow* v. *Whitmore* (1), that when a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burdens. Trustees of a club who have incurred liability on behalf of a club are entitled to indemnity out of any property of the club to which their lien extends: *Wise* v. *Perpetual Trustee Co.* (2). But in those cases the property was not bound by any trust. The question of personal liability of the members of the congregation is not open on this appeal.

Ronan, K.C., Matheson, K.C., and *Williamson,* for the respondents :—

The plaintiffs subscribed largely to the building of this church; they also guaranteed the debt due to the bank, which was admitted all through to be the debt of the congregation. It is now sought to turn this debt into a gift from the plaintiffs by those who were using the church. The Board of Deacons authorized the guarantee, and it was treated as a congregational debt. In *Minnitt* v. *Lord Talbot de Malahide* (3) Sullivan, M.R., held that in the case of a *quasi*-corporate body *quasi*-corporate property is liable to the *quasi*-corporate debt. If a building is erected and used for public purposes, a Court of Equity will give effect to a charge on the building by an order for sale: *Grissell* v. *Money* (4).

June 7. THE LORD CHANCELLOR :—

This is an action seeking to have declared a lien on a church, and church property, belonging to the Hamilton Road Presbyterian Congregation of Bangor, with the consequential remedies of sale and receiver; also for an account of the sums paid by the plaintiffs on foot of a guarantee to the Bank of Ireland, and, if there be a deficiency after the sale, for a declaration that

(1) 9 H. L. Cas. 391.
(2) [1903] A. C. 159.
(3) 1 L. R. Ir. 143; 7 L. R. Ir. 407.
(4) 38 L. J., Ch. 312.

such of the defendants as are found not to have contributed their full proportion of the amounts paid by the plaintiffs and three defendants, Montgomery, Neill, and M'Meekan, may be ordered to pay to the plaintiffs their proportion.

There is no claim to make the ten defendants personally liable to contribute, apart from the specific relief sought against the Church property.

The two plaintiffs and ten defendants are all members of the congregation of the church.

The plaintiff James Bowman and three of the defendants, S. G. Montgomery, James Neill, and John M'Meekan, are also trustees in a lease of the church buildings, dated the 12th December, 1899, granted for the benefit of the congregation, and are sued as such; and the plaintiffs and defendants are also members of the Board of Deacons of the same Presbyterian congregation, and they are sued in their personal capacity, and as members of the Board of Deacons, and as representing the congregation. This Board of Deacons was formed under the constitution of the Presbyterian Church in the month of May, 1899. The congregation was formed under the laws of the same Church on the 11th June, 1897.

The church was built in the year 1899, and was finished and opened for worship in the month of September of that year. The minister's house in connexion with the church was built at the same time. All those buildings were erected out of moneys borrowed from the Bank of Ireland, and this loan was given on two guarantees. The first, which was for £3000, was dated the 20th December, 1898, and this was signed by the plaintiffs and by the defendants Hill, Montgomery, Neill, M'Meekan, and one Edward Watson. The erection of the church proceeded. The tender of James Colville was accepted; but he early made default, and another contract was entered into with persons named M'Loughlin and Harvey, for the completion of the buildings.

The plaintiff James Bowman, and the defendants Montgomery, Neill, and M'Meekan had been appointed a building committee.

The second guarantee was in fact not signed until the 14th May, 1900, long after the church buildings had been finished,

Appeal. 1907. BOWMAN v. HILL. The Lord Chancellor.

but in the meantime, on the 12th December, 1899, a lease was taken of the church buildings, and as it is against the Church property comprised in that lease the charge is sought in this action, and has been declared by Judge Barton, the terms of that lease are of most vital importance, as well as the laws and constitutions of the Presbyterian Church under and by reference to which it was taken: but I shall reserve the statement of that lease until I have concluded the history of the guarantees.

In May, 1900, M'Loughlin & Harvey's account for the completion of the church buildings had been sent in, and they were pressing for payment. There had been the usual extras, and there had been litigation, and it was found necessary to go to the Bank again for financial help, and on the 14th May, the Board of Deacons authorized the building committee to settle with the contractors, and on the same 14th May, 1900, James Bowman, John M'Meekan, James Neill, and S. G. Montgomery entered into a fresh guarantee with the Bank of Ireland for a sum of £4000, which included the £3000 already guaranteed.

These facts were brought before the Board of Deacons on the 30th May, 1900, when it was moved and seconded, and unanimously passed: "That we hereby approve of and accept a further overdraft from the Bank of Ireland of £1000, which now makes the total amount of overdraft from the Bank a sum of £4000, and that we appoint Messrs. S. G. Montgomery, James Neill, John M'Meekan, Henry Bowman, and James Bowman, to act on behalf of the congregation as guarantors to the Bank for payment of this amount, or whatever portion of it may be advanced from time to time, and that we also confirm the agreement made by the building committee with Messrs. M'Loughlin and Harvey, relative to the settlement of their account."

Mr. Brown in his argument for the appellants raised several objections to the formality of the proceedings of the congregation as to the summoning of their meetings and the constitution of their committees; but I think after the resolution of the 30th May, 1900, we should assume—1, that the Board of Deacons authorized the borrowing of this £4000 by the guarantors; 2, that it was for the purpose of the church buildings; and 3, that the loan was treated as a congregational debt. It is treated as

such in the annual account of the Church property—its assets and liabilities. But on the other hand, neither on the part of the Bank, who lent the money to individuals and in fact refused to lend it on any other terms, nor in the contemplation of the members of the congregation, is there any trace of an idea that the £4000 was to be secured on the Church property.

The idea of a charge on the premises by contract is negatived in my opinion by the facts of the case. The Bank had no intention to look to the church premises as their security, and equally I think the persons who made themselves liable to the Bank looked not to the premises but to the not unnatural expectation that the generosity and sympathy of the Presbyterian public would ultimately keep them safe. Of course those who paid more than their share had their right of contribution against all who were jointly liable with them; but this action is not founded on any such personal right; and it will not be affected by a dismissal of an action founded upon a claim to a charge on the premises.

At this stage it becomes material to consider the title to the church premises under the lease of 12th December, 1899. [His Lordship referred to the clause in the lease, *ante*, pp. 453, 454.]

The Constitution of the Church is referred to in that lease, and I shall mention the material clauses of the code to which we were referred. [His Lordship read Articles 193, 194, 206, 207, 226, 229, 234, 241, 339, of the Laws of the Presbyterian Church, *ante*, pp. 452–454, note.] "Sale" there means a sale consistent with the trusts, not a sale which would do away with them.

Having regard to these ordinances, and to the terms of the lease, it would have been illegal to attempt, expressly, or by consequence, a diversion of the property from the purposes of the church; and I think that if the deacons or congregation had given in terms a mortgage or lien on the Church property to the Bank or its guarantors, such mortgage or lien would have been wholly invalid.

The case of *Minnitt* v. *Talbot* (1) was one in which the property was free property, capable of being charged by contract, or under equities arising from conduct which had the

(1) 1 L. R. Ir. 143; 7 L. R. Ir. 407.

Appeal. 1907.

BOWMAN v. HILL.

The Lord Chancellor.

force of contract; and I may refer to the case of *Wise* v. *Perpetual Trustee Company* (1) as prescribing reasonable limitations to the case of *Minnitt* v. *Talbot* (2) arising merely from the subject-matter dealt with.

In *Darke* v. *Williamson* (3) there was an equitable mortgage with custody of the deeds, and the trustees took a transfer of it, and the solicitor held the deeds for them. The Master of the Rolls left the deeds with the trustees, but refused to give effect to any lien by sale.

I do not think we should give a judgment which in the same breath we should say cannot be realized. I am of opinion that the appeal must be allowed, and the action dismissed.

FITZGIBBON, L.J. :—

I concur with the Lord Chancellor; and I wish to state the principle on which I allow the appeal. But it is necessary before going further to show how this suit is limited, and how completely beside the question which we have to decide is the question of personal liability, which may or may not exist, but on which it would be wrong, even if it were possible, for us to express any opinion. The statement of claim—the foundation of the suit—prays for specific relief against defined property, and nothing else. It seeks a declaration—

> "That the plaintiffs have a lien on the building known as the Hamilton Road Presbyterian Church, Bangor, and all other the property of the said congregation, for the amount found to be due to them; and that the said lien may be enforced by receiver or sale of the said building, and by sale of all other property of the said congregation. *In case of deficiency after said sale*, that contribution may be decreed, except as against persons who have already contributed their full proportion."

If the property is sufficient to realize the amount claimed, no further or other alternative relief is asked; and it is only "in case of deficiency" that personal relief is sought by way of contribution to make up that deficiency.

(1) [1903] A. C. 139. (2) 1 L. R. Ir. 43; 7 L. R. Ir. 407. (2) 25 Beav. 622.

Barton, J., after a clear but condensed statement of the facts, which I accept as correct, says :—

> "It seems to me that the plaintiff, James Bowman, as one of the trustees of the congregation, has a very clear right of indemnity in regard to this expenditure, out of all the trust property of the congregation. As regards personal liability, for reasons analogous to those mentioned in *Wise* v. *Perpetual Trustee Co.* ([1903] A. C. 139), he would not have a right to proceed personally against the members of the congregation as such. A personal liability of that kind was not contemplated by the terms of the trust, and does not seem to be consistent with the condition upon which he undertook the trust. But as regards those of the *cestuis que trustent*, who actually requested or ratified his expenditure on their behalf and for their benefit, his claim is one which stands upon a different basis, namely, upon their request and adoption, and not upon mere membership of the congregation."

With all respect, if personal liability could not be established against the members of the congregation as such, because it "was not contemplated by the terms of the trust," or was not "consistent with the condition" upon which the trust was undertaken, the very same consideration must, *a fortiori* if possible, be fatal to the idea of a lien on, or right of indemnity out of, the trust property. Every witness in the case, notably the plaintiff, James Bowman, has in the clearest terms repudiated the idea that, under the terms or conditions of the trust, as contemplated by everyone, the church building on which the money was spent, or any other property of the congregation, was to be liable to any charge, lien, or sale, or to be converted to any other use save that of religious worship. The appointment of a receiver who would raise money by hiring or letting the church, taking up the collection, or managing the congregational property as a source of profit, is equally repugnant to the trust, and impracticable.

Further on in his judgment Barton, J., says :—

> "The action is really framed upon the judgment and decree in a case which I cannot distinguish from this case in principle, viz. *Minnitt* v. *Lord Talbot de Malahide* (1 L. R. Ir. 143), and I am of opinion that the observations of the Lords who decided *Bristowe* v. *Whitmore* (9 H. L. Cas. 391), some of which are cited in *Minnitt's Case* (at pp. 151, 152), are as applicable to the present case as they were to *Minnitt's Case*."

Appeal. 1907. BOWMAN v. HILL. Fitz Gibbon, L.J.

I do not question any proposition of law laid down in *Minnitt's Case* (1), and I assume—although I do not admit, because that may have to be proved subsequently—that evidence of fact exists in this case against many members of the congregation, which would establish personal liability against them. But the effect of the decision is only that if a number of individuals get work done for the common personal benefit of them all, but on the personal pecuniary responsibility of some of them only, taking the benefit of the work is the common act of all, and ratifies for all the acts of those who get the work done. In *Minnitt's Case* (1) the relation of principal and agent existed as against all the members of the Farmers Club, and the expense was incurred for the personal and exclusive benefit of all. The committee who incurred the expense did so as agents for the whole body of the beneficial owners of the property. Agency in incurring the liability being established, the agents were entitled to treat the liability as that of all the constituents, and those constituents held the property, in equity, subject to the prior obligation to pay for it. But that case has no application here unless the members of this congregation, all being assembled together, could have given a mortgage, charge, or lien on the church, or could have appointed a receiver to make money of it for their own benefit. I hold that they could do nothing of that kind, for the property was created for a different purpose, under different conditions, and on a different trust, not limited to the existing members of the congregation.

My judgment does not rest on the Law of Charities, nor on the provisions of the leases alone; these are only confirmations of the otherwise conclusive proof that, by the constitution of the congregation, by the laws of the Presbyterian Church, by the terms of the leases, and by the common understanding of all the parties, any lien, charge, sale, appointment of a receiver, or other like dealing with the church or property, would be absolutely inconsistent with the terms, conditions, purposes, or trusts, upon which the money was spent for which the plaintiffs claim a specific remedy. The terms of the tenure only create a further difficulty. The decree could not be enforced consistently with the landlord's

(1) 1 L. R. Ir. 143; 7 L. R. Ir. 407.

contractual rights in the property on which the money was spent.

Let us see how far the principle of this decree would extend. A reputedly wealthy person undertakes to spend a large sum in repairing or restoring a cathedral. Before the work is finished he finds himself unable to pay the builder. Can the cathedral be sold, or a receiver appointed over it, to pay the bill? This Bangor Presbyterian church must be in the same position. A number of people resolved to erect it, for a religious purpose, intended to benefit others as well as themselves; they expected to raise enough money to complete it; they probably would have done so if it had cost less; and probably even now the funds will, in time, be provided; but, meanwhile, equity can neither order a sale, nor appoint a receiver, nor divert the property to secular uses, against the intention of everyone who was concerned in the undertaking, either when the building was started, or when the money was spent.

The Lord Chancellor has mentioned the other cases cited, and Holmes, L.J., whose judgment I have read, will also refer to them. The principle of our decision is that the enjoyment by a congregation of an advantage for which some members had made themselves liable to pay, raises no equity to apply the congregational property to indemnify some individuals against the failure to obtain the contributions which were expected to cover the expense.

Barton, J., made no declaration with respect to personal liability, pending the attempt to realize the plaintiffs claim out of the property. Our judgment does not touch the question of personal liability at all, because it is not at issue in the action, except upon the assumption of a specific right against property which we hold not to exist.

This action must be dismissed; but if the question of personal liability is hereafter raised, I am not to be taken as holding that it can be limited to the board of deacons, or to any individuals representing the congregation as such. As at present advised, I think that the decision in *Minnitt's Case* (1) may be applied to make every individual responsible, on the doctrine of agency, who

(1) 1 L. R. Ir. 143; 7 L. R. Ir. 407.

Appeal. 1907.

BOWMAN v. HILL.

Fitz Gibbon, L.J.

knowingly allowed an act to be done, or a liability to be incurred, for his benefit, on the understanding that the liability was to be shared by a number of individuals of whom he was one, though the benefit was also to extend to a whole congregation, whose members were not bound to contribute merely as such, but were only expected to give voluntary contributions according to their ability and goodwill.

HOLMES, L.J. :—

The judgment appealed from (omitting words of surplusage) directs an inquiry to ascertain how much of the amount paid to the Bank of Ireland on a guarantee of the 14th May, 1900, was expended on the premises comprised in a lease of the 12th December, 1899, in building the Hamilton Road Presbyterian Church, Bangor, and in providing fittings and furniture therefor, and declares the plaintiffs entitled to a lien or charge upon all the said premises which were acquired or provided by the moneys obtained under the said guarantee equal to two-fifths of the sum to be certified as the result of such inquiry, and that, in default of payment to the plaintiffs of such two-fifths with interest and costs within a specified period, they be at liberty to apply to have all the aforesaid premises sold for the purpose of paying the same. This was the substantial part of the claim made by the plaintiffs in the action ; but the consideration of certain supplemental relief asked for by them was adjourned until the case should be brought forward for further consideration.

The circumstances leading to the litigation can be briefly stated. There were two Presbyterian churches in Bangor, a much-frequented seaside resort in the county Down ; but it was found that they afforded insufficient accommodation for the summer visitors. Accordingly, steps were taken to have a third church erected. The Presbyterian Church in Ireland, as in other countries where Presbyterianism exists, possesses a constitution and form of Government, providing in the most minute details for its regulation and management ; and the first condition required for having a third church in Bangor was to form a congregation of persons who would become members or adherents thereof. It is unnecessary to enumerate the steps required to be taken for this purpose,

as it is admitted that a congregation, consisting, in the first instance, of over a hundred persons, was duly constituted on the 11th June, 1897. Speaking with the diffidence which one feels in dealing with a subject of which I know but little, I gather that the temporal affairs of the congregation, including all matters connected with income and expenditure, and the erection, repair, and renewal of buildings belonging to them, are to be entrusted to an elected Board of Deacons; but, from oversight or otherwise, no deacons were appointed in the new congregation until May, 1899. A committee, however, had been formed, for the purpose of having the congregation duly constituted, and this committee, with a sub-committee thereof, continued afterwards to do the work which, by the constitution, ought to be performed by a Board of Deacons. The most prominent of these gentlemen were the plaintiff, James Bowman, and the defendants, Neill, M'Meekan, and Montgomery, who were appointed in an informal way trustees. They negotiated the terms of a lease from Mr. Ward, the lord of the soil; they opened two bank accounts on behalf of the congregation, and they signed a contract in March, 1898, with one Colville, for building a church on the premises proposed to be demised for £3715. Colville got into pecuniary difficulties, which led to expensive legal proceedings, and another contract was made with other builders to finish the work for £3200. Of course it was believed when these liabilities were incurred that they would be met by voluntary contributions, and money was subscribed with the liberality shown in Ireland by Christians of all denominations for their respective Churches. But, from one cause or other, the cost of providing a church and manse far exceeded the £3500 at first contemplated. Close on £8000 was expended before the buildings were completed, and the accounts with the bank were largely overdrawn. James Bowman and some others gave their personal guarantee to secure an overdraft of £3000, and more money having been afterwards required to clear the debt due to the second contractors, there was substituted for the first guarantee another for £4000, signed by the two plaintiffs and three of the defendants. In the meantime the Board of Deacons was duly constituted; and, although the work was then far advanced, they did not repudiate anything that had been already

Appeal. 1907.

BOWMAN v. HILL.

Holmes, L.J.

done. On the contrary, they ordered further expenditure, and, on the 14th May, 1904, they authorized payment of the second contractors' account. It was then that it was found that the guarantee for £4000 was required, and, by resolution of the deacons, an overdraft for that amount was approved of, and the two plaintiffs and three of the defendants were appointed to act as guarantors thereof to the bank. The sum thus due was afterwards reduced by the application of congregational funds; but in July, 1904, the plaintiffs were compelled, under pressure of a writ issued by the bank, to pay the balance, amounting to £2726. They were immediately afterwards repaid by the three other guarantors their proportion of this sum; but these gentlemen, although named defendants, are not now making any claim against the congregation, and the action is wholly conversant with £1090, which the plaintiffs have not been recouped from any source.

It is not difficult to show, as Mr. Brown has done, that the steps taken by the trustees and the building committee were not authorized by the constitution of the Church, and were irregular from beginning to end. At the same time, there is no doubt that the money guaranteed and paid to the bank was applied in erecting the buildings which have been used for years by the minister and congregation, that the Board of Deacons expressly authorized the guarantee, and that the amount due to the bank was set forth as a debt in the annual financial statements issued on behalf of the members of the Church. Indeed, notwithstanding the curious and rather unintelligible evidence given by one or two of the defendants, the congregation, when asked in a meeting duly convened, to recognize this sum as a congregational liability, instead of repudiating it, passed a dilatory resolution, having been probably led to take this course from a fear that by adopting it they might make themselves personally responsible.

I, therefore, deal with the case on the basis that it was a congregational debt, and that the plaintiffs have all the rights that this gives them. We are not at present called on to decide any question of personal liability. The object of the suit is to have the sum charged and raised out of the congregational property; and although a remedy against the defendants personally is asked for by way of supplemental relief, Barton, J., postponed its

consideration, and it disappears altogether if the main question is decided against the plaintiffs. The property sought to be charged is the lands demised by the lease of the 12th December, 1899, mentioned in the judgment, on which the church and manse have been built. It is probable that the terms of this lease were arranged before the work began; but it was nearly, if not altogether, completed when the lease was executed. It is likely that the delay arose from the fact that the trustees were to covenant to expend £4000 on buildings, and they desired to have this money laid out before execution.

I am of opinion that the case depends upon the nature and effect of this instrument. The lessor is Mr. Ward, the head landlord of the town and neighbourhood of Bangor, and the lessees are the plaintiff and three of the defendants described as trustees nominated by and on behalf of the congregation in connexion with the General Assembly of the Presbyterian Church in Ireland, known by the name of the Hamilton Road Presbyterian Church. There is a recital of the due constitution of this congregation, and that they had applied to the lessor for a lease of ground to be used for the erection thereon of a house of worship, and other purposes of the said congregation, and also for a piece of ground to be used for the erection thereon of a manse for the residence of their minister for the time being.

Then follows a demise of the premises for a term of 999 years, at the rent of £20 a year, upon trust "for the said congregation so long as the same shall remain under the jurisdiction of the said Assembly, and profess and maintain the doctrines contained in the Confession of Faith and the Larger and Shorter Catechisms of Westminster, and for such members of the said congregation for the time being as shall remain under or acknowledge such jurisdiction and profess and maintain such doctrines." It is to be noted that the Constitution recognizes a power by the congregation to sell their church and manse with the consent of the Presbytery, and gives in its Appendix a form of lease, containing provisions regulating the mode of carrying out such a sale. The lease in this case follows this form pretty closely, in so far as I have quoted it; but it omits all reference to a sale. On the contrary, amongst the covenants there is, with the usual condition for

Appeal. 1907.

BOWMAN v. HILL.

Holmes, L.J.

re-entry, a covenant by the trustees to expend £4000 in building a church and manse, and a further covenant not to allow any building to be erected on the demised premises to be used "otherwise than for the purpose for which this lease has been expressed to have been granted." It seems clear that the intention of the lessor and the lessees was that the premises were to be demised for the charitable purpose of providing a church and manse for the Hamilton Road congregation for the time being and its minister during the continuance of the term. I have not the slightest doubt that the idea never occurred to the minds of the plaintiffs, or of any other of the persons who incurred liabilities in connexion with the building, that they would or could be secured by a charge on the premises. The claim of the plaintiffs at the meeting of the congregation and before the Presbytery and General Assembly was that the sum paid by them should be regarded as a congregational debt, and it was the ingenuity of counsel that first suggested a lien. The only way in which such a lien could be made effective would be by a sale, and this is the remedy contemplated by Mr. Justice Barton's judgment; but a sale would be in direct violation of the object of the lease and the trusts created thereby.

This case is wholly different from *Minnitt* v. *Lord Talbot de Malahide* (1), the authority relied on in the Divisional Court. In it the lands on which the money was spent had been demised to the trustees of a social club without any special provisions or trusts, and there was, so far as I can see, nothing to prevent the members of the club selling or otherwise dealing with the premises at any time. The two cases before Lord Romilly give no help to either side. The absence of authority is not unimportant. According to my experience there are very few religious or other charities that are not in debt—often heavily in debt; and probably the most common cause of their indebtedness is the erection of buildings for the purposes of the charity with money borrowed from a bank on the guarantee of trustees or other persons interested. The fact that we can find no case in which the creditors have attempted to realize what was due to them by selling the buildings goes far to show that lawyers do not think this a possible remedy.

(1) 1 L. R. Ir. 143; 7 L. R. Ir. 407.

The Hamilton Road congregation and their friends have been very liberal in the past, and I see no reason for thinking that they will be otherwise in the future. Indeed, since these proceedings began, there was contributed a few hundred pounds, which it was proposed to divide equally between the five guarantors; but the plaintiffs refused their share, whereupon the whole sum was given to the three others. Therefore, although we must allow the appeal and dismiss the action, I have some hope that the plaintiffs, if they are patient and reasonable, will be ultimately fully paid.

Solicitor for the plaintiffs: *John M'Kee.*
Solicitors for the defendants: *Carson & M'Dowell.*

R. D. M.

ATTORNEY-GENERAL (O'DUFFY) *v.* MYDDLETONS, LIMITED.

Barton, J.
1907.
June 13–15.
July 18.

(1906. No. 996.)

Dentist—Company—Registration under Companies Acts—Use of word "dentist"—Dentists Act, 1878 (41 & 42 *Vict. c.* 33)—*Fraud—Injunction.*

Although the word "person" in section 3 of the Dentists Act, 1878, has been held not to include artificial person, and not to apply to limited companies, a limited company is not at liberty to use the word "dentist" or its synonyms in such a way as to amount to a false representation, calculated to induce the public to believe that the individuals whom it comprises or employs are qualified "dentists," and may be restrained from doing so by injunction at the suit of the Attorney-General.

IN this action the plaintiff in the statement of claim averred—

1. That the defendants Alfred Myddleton, Amy Myddleton, William Bowles, James Cochrane, William Greenlee, John Walters, and Robert G. Gordon, wrongfully and fraudulently and with intent to injure and deceive the public, and to injure and defraud the persons registered under the Dentists Act, 1878, conspired together to form, and did form and procure to be registered the defendant Company, Myddletons, Limited.

Barton, J.
1907.

ATTY.-GEN. v. MYDDLETONS, LIMITED.

2. That the defendant Company, Myddletons, Limited, was incorporated on the 28th June, 1902, and was registered under the Companies Acts, 1862 to 1900, as a Company limited by shares, having a nominal capital of £1000, divided into 1000 shares of £1 each, all of which were allotted to the defendants other than the defendant Company, and were then held by them. That 993 shares had been allotted to the defendant, Alfred Myddleton, for an alleged consideration, other than cash, and that one share was allotted to each defendant, other than the Company, for an alleged consideration of £1.

3. That the defendants Alfred Myddleton and Amy Myddleton were the directors, and the defendant Alfred Myddleton was the manager and secretary of the defendant Company, and that the defendants, other than the Company, were the signatories to the memorandum of association of, and the only shareholders in, the defendant Company.

4. That among the objects, as stated in the memorandum of association of the defendant Company, for which the incorporation of the defendant Company was procured by the other defendants were the following: to carry on in any part of the United Kingdom or elsewhere all or any of the trades or businesses of surgeon-dentists, dentistry, teeth specialists, and manufacturers and dealers in dental materials and appliances, and any other business which, in the opinion of the Company, could be conveniently carried on by the Company in connexion with the above or any of them, and to employ properly qualified persons to act on the Company's behalf as surgeon-dentists or otherwise in connexion with the said business aforesaid, or any other trade or business which might be carried on by the Company in any manner in which such persons might act if they or he were carrying on upon his or their own behalf any of the businesses of the Company.

5. That in pursuance of the conspiracy aforesaid, the defendant Company had been, and was still being, extensively advertised in Belfast, Lisburn, Lurgan, Portadown, Downpatrick, and other towns in the north of Ireland as Myddletons, Limited, surgeon-dentists and specialists in American dentistry, and the public were by such advertisements bidden to ask for Messrs.

Myddleton, the largest dentists in Ireland; and that these advertisements and handbills of the defendant Company were prepared and issued with the object of inducing the public and customers of the defendant Company to believe that the business of the Company was conducted and carried on by persons registered under the Dentists Act, 1878, or specially qualified to practise dentistry.

6. That the defendant Company was formed and procured to be registered as aforesaid by the signatories to the memorandum of association for the purpose of imposing upon and deceiving the public, by falsely representing to them that the business of the Company was conducted or carried on by persons registered under the Dentists Act, 1878, and for the purpose of injuring and defrauding persons duly registered under that Act, by depriving them of the fees and charges for the performance of dental operations and for dental attendance and advice, which were by the said Act made recoverable only by persons registered thereunder, or by legally qualified medical practitioners, and for the purpose of taking and using the title dentist and surgeon-dentist against the provisions in that behalf in the Dentists Act, 1878.

7. That the defendant Company was not registered, or capable of being registered, under the Dentists Act, 1878. That neither of the directors of the Company nor any signatory to the memorandum of association of the Company was so registered. That the business of the Company was not conducted or carried on by any person or persons registered under the Dentists Act, 1878, or entitled to take or use any name, title, addition, or description implying that he was so registered, or that he was a person specially qualified to practise dentistry.

8. That the defendant Company and the directors and members thereof had employed the defendant Alfred Myddleton to carry on business under the memorandum of association of the Company under the titles of surgeon-dentist and dentist, and had falsely and fraudulently held forth and represented in the register of directors and managers of the Company, and in the reports and returns made to the Registrar of Joint-Stock Companies, that the defendant Alfred Myddleton, the secretary, manager, and one of the directors of the Company, was a dentist.

Barton, J.
1907.

ATTY.-GEN. *v.* MYDDLETONS, LIMITED.

The plaintiff claimed :—

1. An injunction to restrain the defendant Company from advertising for custom under, and from taking or using, the name, style, addition, or description of dentists or surgeon-dentists, or any name, style, addition, or description containing the word dentist, either alone or in combination with any other word or words, or any name, title, style, addition, or description implying or reasonably calculated to induce the public or persons dealing with the said Company to believe that the business carried on by the Company was conducted or carried on by a person or persons registered under the Dentists Act, 1878, or specially qualified to practise dentistry.

2. A declaration that the defendant Company was not formed for a lawful purpose under the provisions of the Companies Acts, and was not entitled to be or remain registered under the Companies Acts.

3. An injunction to restrain the defendant Company and the directors and members thereof from employing the defendant, Alfred Myddleton, under the title surgeon-dentist or dentist, to carry on business under the memorandum of association of the said Company, and from holding forth or representing in the register of directors and managers, or the reports or returns made pursuant to the Companies Acts to the Registrar of Joint-Stock Companies, or elsewhere or otherwise, that the defendant Alfred Myddleton was a dentist.

4. An injunction to restrain the defendant Company from carrying on the business of dentists or surgeon-dentists under the memorandum of association of the said Company.

5. An injunction to restrain the directors and members of the defendant Company from allowing the Company to remain registered under its present memorandum of association.

The defendants traversed the allegations in the statement of claim.

The nature of the evidence, which was entirely of a documentary character, appears sufficiently in the judgment of Barton, J.

Ronan, K.C., Samuels, K.C., and *Gerald Fitz Gibbon*, for the relator :—

By the Dentists Act, 1878, section 3, a person cannot use the name of dentist, except he is registered under the Act, and *O'Duffy* v. *Jaffe* (1) decides that a Company is not a person within the meaning of section 3. That case, however, has no application to the present. The most important case here is *The King* (*Rowell*) v. *Registrar of Joint-Stock Companies in Ireland* (2). A mandamus to compel the Registrar of Joint-Stock Companies to register a Company where the name of the Company contained the word "dentist" was there refused, such use of the word being calculated to deceive the public. The memorandum of association of this Company contains false representations, tending to mislead the public into the belief that the persons carrying on its business were dentists. The statute gives a meaning to the word "dentist"; and persons holding themselves out to the public as dentists, when they are not, commit a fraud on the public. The report and various returns made to the Registrar of Joint-Stock Companies describe Myddleton as a dentist, and the same description is found in the advertisements issued by the Company. These would all have the effect of inducing the public to believe that they were dealing with properly qualified dentists, whereas, as a matter of fact, none of the persons connected with the Company are registered under the Act. Once fraud is established an injunction lies, and the Attorney-General is entitled to apply to stop the fraud: *Attorney-General* v. *Appleton* (3).

S. L. Brown, K.C., Healy, K.C., W. M. Whitaker, K.C., and *J. M. Whitaker*, for the defendants:—

The entire case is whether a limited Company can carry on the business of dentistry, describing itself as "dentist." There is no issue of fraud at all. Prior to 1878 dentistry was a perfectly free trade. The Medical Act, 1858 (21 & 22 Vict. c. 90, s. 48), first dealt with dentistry, and gave power to give diplomas, but it did not affect the lawful trade or business of dentist. There was no restriction upon dentists until 1878, and all that the Act of that date does is to prevent persons

(1) [1904] 2 I. R. 27. (2) *Ibid.* 631. (3) [1907] 1 I. R. 252.

Barton, J. 1907.

ATTY.-GEN. v. MYDDLETONS, LIMITED.

calling themselves dentists unless duly registered (section 3). The only other section limiting the practice of dentistry is section 5, which prevents the recovery of a fee by a practitioner who is not registered. Section 5 applies only to "person," too. "Person" does not include a Company: *O'Duffy* v. *Jaffe* (1); see also *Pharmaceutical Society* v. *London and Provincial Supply Association* (2), where the word "person," though in a different Act, has received the same interpretation. In the present case the word "dentist" does not occur in the name of the Company, and the registration of the Company could not have been prevented. So far as the Company is concerned the action must fail. The use of the word "dentists" only occurs in a few isolated returns, and could not have the effect of deceiving the public at all. In *The Attorney-General* v. *Appleton* (3) fraud was expressly admitted.

Samuels, K.C., in reply.

July 18.

BARTON, J.:—

In applying to the present case the authorities which have been cited, the particular form and character of this proceeding have to be borne in mind, as well as the peculiar nature of the rather scanty evidence which the plaintiff has laid before the Court. *Jaffe's Case* (1) was an appeal from a Justices' conviction under section 3 of the Dentists Act, 1878. *Rowell's Case* (4) was an application for a mandamus to the Registrar of Joint-Stock Companies to register a limited company. *Hennan & Co., Limited*, v. *Duckworth* (5) was an action for work done and goods supplied. *Appleton's Case* (3) was, like the present one, an action for a Chancery injunction at the suit of the Attorney-General to restrain a public fraud. But there is an important difference between that case and this one. In *Appleton's Case* (3) the Court had an easy task, because fraud was admitted. In the present case nothing is admitted, and the burden lies on the plaintiff to establish his case by evidence. The plaintiff has produced no oral evidence as to the operations of the Company, and has

(1) [1904] 2 I. R. 27.
(2) 5 A. C. 857.
(3) [1907] 1 I. R. 252.
(4) [1904] 2 I. R. 634.
(5) 20 T. L. R. 436.

relied principally upon the memorandum of association, official reports, and advertisements.

I cannot say that the memorandum of association in this case is open to legal objection. The title of this Company does not contain the word "dentist," or any of its synonyms, or any allusion to dentistry. The principal purpose of incorporation was to carry out dental operations by means of properly qualified persons—a purpose which is not *per se* illegal. If the Company were to carry out dental operations by means of unqualified persons, serious questions might arise, including the question of *ultra vires*. But there is no evidence in this case upon that question of fact. We do not know who has carried out the dental operations of this Company. We may have suspicion in view of the contents and character of these widely circulated advertisements. But there is no evidence on the point. I have said enough to show that the plaintiff claims wider relief than the evidence justifies.

The plaintiff has, however, established his right to the relief claimed in paragraph 3 of the prayer of the statement of claim, with some amendment and enlargement. That relief is limited to misrepresentations as regards Alfred Myddleton or persons of that name. Alfred Myddleton was the originator of the Company, and has acted as its managing director; but it has not been proved that he or any person of his name has since its incorporation carried out any of the dental operations of the Company. But we know that neither he nor any individual of his name is a registered dentist; and there is evidence, to which I shall refer, that the defendants have made representations to public officials in official documents, and to the public in advertisements and announcements, which were calculated to induce the belief that the Company comprises or employs Alfred Myddleton or individuals of that name who were or are registered dentists.

In the report registered November 1st, 1902, and made to the Registrar of Joint-Stock Companies pursuant to section 12 of the Companies Act, 1900, we find, in the list of directors, Alfred Myddleton described as a dentist. The report was certified by him as director. In the registered return of allotments from June, 1902, to June, 1903, made in pursuance of sect. 7 (1)

Barton, J. 1907.

ATTY.-GEN. v. MYDDLETONS, LIMITED.

of the Companies Act, 1900, Alfred Myddleton appears as allottee of 994 out of 1000 shares, and is described as dentist. The report was signed by Alfred Myddleton as secretary. In the register of directors and managers (registered 1st November, 1902), Alfred Myddleton was described as dentist, and the register is signed by him. In the list of persons holding shares made up to 15th February, 1904, and signed by Alfred Myddleton as managing director and secretary, Alfred Myddleton was described as dentist. It is admitted that these descriptions of Alfred Myddleton as a dentist cannot be justified; but it is said that they are isolated acts, not recently repeated or likely to be repeated. But they do not stand alone. I find in the advertisements of the Company several passages which I think amount to representations which are reasonably calculated to lead the public to believe that the Company comprises or employs persons named Myddleton who are registered dentists. For example, in the handbill advertisements headed on one side "Reliable Dentistry," and also in another headed on one side "Teeth of Quality," there is the statement—"Make no mistake, ask for Myddletons, the largest dentists in Ireland." In several of the advertisements the Company gives to the public their telegraphic address as "Myddletons, Dentists, Belfast." There are other notices and advertisements in which the Company refer to themselves as "Messrs. Myddletons, Limited, largest Dentists in Ireland." These advertisements seem to me to be calculated to lead the public to believe that the Company comprises or employs individuals of the name of Myddleton who are properly qualified dentists. I must add that these representations have an added significance when they are coupled with the announcement that "anæsthetics, including chloroform, can be administered at any hour"; as to which the public might be expected to look for, and to be attracted by any representation of, proper qualifications.

I am disposed to think that defendants' counsel have endeavoured to found upon *Jaffe's Case* (1) a larger claim of privilege for companies than the decision in that case will support. They claim for limited companies, as a result of that case, an unre-

(1) [1904] 2 I. R. 27.

stricted right to use the word "dentist" or its synonyms in any and every shape, and in any and every context. *Jaffe's Case* (1) decided that the word "person" in section 3 of the Dentists Act, 1878, does not include artificial person; and that the section hits individuals, but does not hit limited companies. But a company, although it may be exempted from the penalties imposed by that section, is not, in my opinion, thereby privileged to make false representations, which are calculated to mislead the public as to the qualifications of the individuals whom it comprises or employs. I think that the official documents and advertisements to which I have referred contain representations of that kind. There may be other advertisements or announcements of the same kind. Each might have to be considered on its own merits.

There will be an injunction to restrain the defendant Company, and the directors and members thereof, from employing the defendant Alfred Myddleton under the title of surgeon-dentist, or dentist, to carry on business under the Memorandum of Association of the said Company, and from holding forth or representing in the register of directors and managers, or the reports or returns pursuant to the Companies Acts to the Register of Joint-Stock Companies, or in their advertisements to the public, or elsewhere or otherwise, that the defendant Alfred Myddleton is a dentist, or that the defendant Company comprises or employs persons of the name of Myddleton who are dentists.

The plaintiff has partially succeeded, and, if he had limited his claim to the relief claimed in paragraph 3 of the prayer of the statement of claim, he would be entitled to the whole costs of the action. The order as to costs will be, that the plaintiff shall have the costs of the action save in so far as they have been increased by the relief claimed in the other paragraphs of the prayer of the statement of claim, which shall be set off.

Solicitors for the plaintiff: *W. G. Bradley & Son.*
Solicitor for the defendants: *Tughan.*

J. MAC M.

(1) [1904] 2 I. R. 27.

L. C.
1907.

In re KENRICK, a Lunatic.

Feb. 16. *Lunatic—Debts—Statute of Limitations—Lunacy Act*, 1871 (34 *Vict. c.* 22), *s.* 95 (1).

The Court will not pay debts contracted by a lunatic before he became of unsound mind, when such debts are barred by the Statute of Limitations.

The Rev. Edward Kenrick was for many years parish priest of Borrisoleigh, in the county of Tipperary, until, in 1899, he became of unsound mind, and was removed to a home outside Dublin. It was considered at the time that his loss of mind would be only temporary; and for some time his parishioners hoped that he would be able to resume his duties. After the lapse of some years, when there was no sign of recovery, it was found necessary to take steps with respect to his property; but his relations refused to interfere. The petition was presented by the General Solicitor for lunatics, on the 5th June, 1906; and an order was made on the 13th July, 1906, declaring the Rev. Edward Kenrick a person of unsound mind, and directing his property to be realized. The property was realized, and was represented by £1040 17*s.* 8*d.* New Consols, and £161 0*s.* 7*d.* cash, and the sum of £138 0*s.* 5*d.* in the hands of the Committee. The income therefrom was estimated to be £30 per annum. In addition, the present parish priest of Borrisoleigh was, under the terms of his appointment, bound to pay £80 per annum for the maintenance of the lunatic.

An application was made to the Lord Chancellor by nine creditors of the lunatic for payment of their debts. The debts were all simple contract debts, incurred mostly to traders in Borrisoleigh and Thurles, for necessaries by Father Kenrick

(1) 34 Vict. c. 22, s. 95: Nothing in this Act contained shall extend to subject any part of a lunatic's property to the debts or demands of his creditors, further or otherwise than as the same is now subject thereto by due course of law.

before he became of unsound mind; but they were all barred by the Statute of Limitations.

L. C. 1907.

In re KENRICK.

H. H. Gogarty, in support of the application.

W. G. Gibson, for the Committee of the lunatic.

THE LORD CHANCELLOR:—

I cannot accede to the application to pay statute-barred debts. I have before refused to do so. Section 95 of the Lunacy Act of 1871 leaves me no discretion on the subject, even if I were disposed to exercise it.

Solicitor for the applicants: *Laurence J. Ryan.*
Solicitor for the Committee: *Sir A. F. Baker.*

R. D. M.

VANDELEUR *v.* GLYNN AND ATTORNEY-GENERAL FOR IRELAND.

H. L. 1907.

June 5, 6, 10. July 15.

Foreshore—Patent—User—Weight of evidence.

APPEAL by the Attorney-General for Ireland, from the judgment of the Court of Appeal, affirming the judgment of the Master of the Rolls (Sir Andrew Marshall Porter, Bart.), reported in [1905] 1 I. R. 483, 509.

The Attorney-General (*The Right Hon. R. R. Cherry, K.C.*), *The Solicitor-General* (*Redmond J. Barry, K.C.*), *Denis S. Henry, K.C.*, and *Garrett W. Walker, K.C.*, for the appellant.

Sir R. B. Finlay, K.C. (of the English Bar), *Matthew J. Bourke, K.C.*, and *Phelps*, for the respondent and plaintiff Vandeleur).

Their Lordships at the conclusion of the arguments took time for consideration.

H. L. 1907.

VANDELEUR v. GLYNN AND ATTY.-GEN.

July 15.

THE HOUSE OF LORDS (Lord Loreburn, C.; Lord James of Hereford, and Lords Robertson and Collins) affirmed the judgments of the Master of the Rolls and of the Court of Appeal, and dismissed the appeal with costs (1).

The curial part of their Lordships' judgment was as follows:

"IT IS ORDERED AND ADJUDGED by the Lords Spiritual and Temporal, &c., that the said order of His Majesty's Court of Appeal in Ireland, of the 5th day of June, 1905, in part complained of in the said appeal, be, and the same is hereby, affirmed; and that the said petition and appeal be, and the same is hereby, dismissed this House. AND IT IS FURTHER ORDERED that the appellant do pay, or cause to be paid, to the said respondent, the costs in respect of the said appeal, the amount thereof to be certified by the Clerk of the Parliaments."

Solicitors for the appellant: *Hallowes & Hamilton.*
Solicitors for the respondent: *Hopgood & Dowson,* for *Cullinan.*

(1) See the case reported—[1907] A. C. 369.

IN THE MATTER OF THE ESTATE OF ANNA G. CRAMER ROBERTS AND MARMADUKE W. C. CRAMER ROBERTS.

Wylie, J.
1907.
Oct. 25.

Land Purchase Acts—Assignment of life estate—Vendors—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 50—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Bonus.*

Where a settled estate was sold under the Irish Land Act, 1903, the vendors being the assignee for value of the tenant for life and the tenant for life under the settlement:—

Held, that the bonus was payable to the tenant for life under the settlement.

QUESTION arising on allocation, as to who was entitled to the bonus payable under section 48 of the Irish Land Act, 1903?

By settlement executed on the occasion of the marriage of the vendors certain property, including the lands sold in this matter, known as the "Kildare estate" was settled upon Marmaduke W. C. Cramer Roberts, one of the vendors, for life, with remainder to him in fee-simple, and in default of male issue to his wife, Anna G. Cramer Roberts, the other of the vendors. Subsequently, by indenture dated 15th August, 1901, Marmaduke W. C. Cramer Roberts, for certain valuable consideration, assigned to Anna G. Cramer Roberts all his estate and interest in (*inter alia*) the said lands, whereupon Anna G. Cramer Roberts entered into receipt of the rents and profits thereof.

After the passing of the Irish Land Act, 1903, Anna G. Cramer Roberts commenced proceedings for the sale of the said lands to the occupying tenants, under the provisions of the said Act. When the matter came before the Examiner, a requisition was made, that Marmaduke W. C. Cramer Roberts be joined as a vendor, and from that time the proceedings were carried on in the names of both as vendors. It appeared that the lands comprised in the estate sold in this matter, when taken in conjunction with other lands subject to common incumbrances, were not insolvent as to income.

Wylie, J. 1907. *In re* ROBERTS' ESTATE.

W. M. Jellett, K.C., for Anna G. Cramer Roberts :—

The case comes within the proviso to section 48 (1) of the Act of 1903, and the bonus should be added to the purchase-money. Since the date of the assignment in 1901 Mr. Cramer Roberts has never received any part of the rents and profits for his own use.

A. C. Meredith, K.C., for Marmaduke W. C. Cramer Roberts :—

The real tenant for life here is Mr. Cramer Roberts. Under section 50 of the Settled Land Act, 1882, he could not have exercised his powers as a tenant for life to the prejudice of the rights of his assignee for value, which could only be affected with her consent: *In re Du Cane and Nettlefold's Contract* (1); see also *Lonsdale* v. *Lowther* (2). By her course of conduct the assignee must be presumed to have consented to the sale by the tenant for life. It was open to her to make terms. She has not done so. The bonus is accordingly payable to Mr. Cramer Roberts: *Estate of J. R. Singleton* (3). The first exception in the proviso to section 48 (1) does not apply. No doubt Mr. Cramer Roberts did not receive any part of the rents and profits since the date of the assignment, but that was not by reason of the fact that the estate was incumbered. The proviso is in aid of incumbrancers. The estate was not insolvent as to income.

WYLIE, J. :—

In this case, a question has been raised as to who is entitled to the bonus. The lands were settled, and the proceedings were commenced, and continued up to the time the case came before the Examiner, in the name of Mrs. Roberts, as assignee of her husband, who was tenant for life under the settlement. The Examiner required that the husband should be made a party to the proceedings, and since that time the proceedings have been continued in the names of both as vendors. Now I am clear, both on the statute and on the authorities, that the real vendor is the husband, and not his assignee, and that the husband has a statutory power to sell, under the Settled Land Acts, with the

(1) [1898] 2 Ch. D. 96. (2) [1900] 2 Ch. D. 687. (3) 40 Ir. L. T. R. 175.

consent of his assignee. I think that, by her acts, Mrs. Roberts must be taken to have consented to the real tenant for life selling under the Act, and I must treat the husband as the real vendor under the Act.

The question is, Is he entitled to the bonus? Mrs. Roberts has no claim. Section 48 provides that the bonus is to be paid to the vendor unless (*inter alia*) the estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents or profits thereof. Now, owing to the assignment of his life estate, Mr. Roberts was not entitled to receive any part of the rents or profits. I have, however, looked carefully into the figures, and am satisfied that the lands which have been sold, when taken in conjunction with other lands, subject to the incumbrances affecting both, were not insolvent as to income, and, therefore, it was not by reason of incumbrances on the estate that Mr. Roberts was not entitled to receive any part of the rents and profits. I, accordingly, hold that the bonus is payable to Mr. Roberts, one of the two named vendors.

Solicitor for Marmaduke W. C. Cramer Roberts: *William J. Shannon.*

Solicitors for Anna G. Cramer Roberts: *Maunsell, Darley, & Orpen.*

J. E. W.

Appeal. 1907. June 25.

IN THE MATTER OF THE TRUSTS OF THE WILL OF CATHERINE BLACK, DECEASED. THOMAS FALLS AND OTHERS *v.* HILDA ALFORD AND LILIAN MARY ALFORD (BY ALICE ALFORD, THEIR NEXT FRIEND AND GUARDIAN AD LITEM) (1).

Will—Construction—Bequest for education.

A testatrix bequeathed £250 to A. "for her education; should A. die under age, to be given to her sister":—

Held, by the Court of Appeal (reversing the decision of Barton, J.), that A. was entitled during her minority as well to the capital as to the income of the legacy, so far as properly required for her education.

APPEAL from an order of Barton, J., made on the hearing of an originating summons.

By her will, dated 21st August, 1899, Catherine Black (*inter alia*) directed her executors, the plaintiffs in this summons, to pay "to Hilda Alford, daughter of Mrs. Alice Alford, £250 for her education; should she die under age, to be given to her sister." The plaintiffs now sought the opinion of the Court as to whether, upon the true construction of the will, they were entitled to apply the capital sum of £250 for the education of Hilda Alford, or were restricted to the payment of the interest only.

It appeared from an affidavit made by Thomas Falls, one of the plaintiffs, that both Hilda Alford and her sister, Lilian Mary Alford, were minors; that the said Hilda Alford had a marked aptitude and taste for the stage, and at her own desire, and with her mother's consent, had commenced the study of dramatic elocution, singing, and dancing, and other kindred subjects, at a school of musical and dramatic art; that she and her mother were unable to pay the fees for the said school and other expenditure incurred in the said course of instruction, including railway fares, refreshments, special dancing costumes, &c., and that, unless the executors

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

were authorized to apply the said legacy of £250 by instalments towards continuing the stage education of the said Hilda Alford, she would be unable to continue such education, which, in the opinion of the executors, afforded the best chance for her success in life.

By an order of Mr. Justice Barton, dated the 3rd day of May, 1907, and made on the hearing of the said summons, it was declared that, upon the true construction of the will, the executors of the said Catherine Black, deceased, were entitled to apply for the education of Hilda Alford the interest only of the sum of £250 mentioned in the will.

Hilda Alford appealed.

Pim, for the appellant, contended that the executors were authorized to apply the capital of the legacy of £250 for the education of Hilda Alford, and that education for the stage was as strictly "education" as any other.

Leech, for Lilian Mary Alford:—

The capital of the legacy must be preserved intact during the minority of Hilda Alford. That the legacy was to be expended for her education does not affect the case, as a legacy for maintenance and education is an absolute gift: see judgment of Shadwell, V.-C., in *Webb* v. *Kelly* (1). The testatrix had two objects in view—the education of one niece; a contingent gift to the other. Both purposes are consistent, and will be effectuated by our contention; but the latter may be defeated by holding otherwise.

THE LORD CHANCELLOR:—

We are of opinion that the appellant is entitled to the capital as well as the interest of the legacy bequeathed to her, so far as the same may be required *bona fide* for the purposes of her education; but we are satisfied that payment of several of the items mentioned in the affidavit of Mr. Falls would not be sanctioned by the language of the will. Our order will not go beyond that.

FITZ GIBBON and HOLMES, L.JJ., concurred.

(1) 9 Sim. 469, at p. 472.

Appeal.
1907.
FALLS
v.
ALFORD.

The following order was made:—

"IN answer to the question submitted, the Court doth declare the appellant, on the true construction of the will of Catherine Black, is entitled as well to the income as also to the capital of the investments representing the legacy of £250, so far as the same may be *bona fide* and properly required for her education during her minority, but that she is not entitled to have the same applied for any non-educational purposes."

Solicitors for all the parties: *A. & L. Goodbody.*

R. ST. J. C.

Ross, J.
1907.
Nov. 13.

IN THE MATTER OF THE ESTATE OF JANE MARY COLEMAN AND OWEN JOSEPH CARAHER, OWNERS; ANNIE L. HENRY, PETITIONER.

Landlord and tenant—Agreement for tenancy—Letting of freehold premises "so long as lessee, his executors, &c., shall pay the yearly rent"—Lease for life or in perpetuity.

C., owner in fee of certain premises, and H., a yearly tenant under C. of the premises, entered into an agreement in writing, whereby, after reciting the existing yearly tenancy, and that C., "for herself and her heirs, executors, administrators, and assigns," had agreed with H., "his executors, administrators, and assigns," to allow him to hold and occupy the undisturbed possession of the premises in consideration of the due payment by H. of the yearly rent of £50, it was witnessed that C. agreed to let, and H. to take, the premises at the yearly rent of £50.

The agreement contained covenants whereby H., "for himself, his executors, administrators, and assigns," agreed to keep the premises in repair, and to carry out alterations on the approval of C., and a covenant by C., whereby C., "for herself, her heirs, executors, administrators, and assigns," agreed with H. that, so long as H., "his executors, administrators, and assigns," continued to pay the yearly rent, C. would continue H., "his executors, administrators, or assigns," as the tenant of the premises, and preserve to him and them the quiet and peaceable enjoyment of same; and a further covenant by H., that H., "his heirs, executors, or administrators," should not set, sell, or assign his interest in the premises without the consent in writing of C., "her heirs, executors, administrators, or assigns, or her or their agent at the time being":—

Held, that the agreement created a tenancy for the lessee's life.

OBJECTION to consolidated final notice to tenants.

The objector, Kate Hughes, was set out in the consolidated final notice to tenants as tenant from year to year; and by her objection claimed to be tenant, under a lease in perpetuity. The objector held the premises under an agreement in writing dated 24th December, 1875, made between Jane Coleman, one of the mortgagors and owners in the matter, now deceased, and Denis Hughes, who previous to 24th December, 1875, had occupied the premises as a yearly tenant under Jane Coleman.

The agreement dated 24th December, 1875, was in the following terms:—"Memorandum of agreement made this 24th day of December, in the year of our Lord 1875, between Jane Coleman, of Balrigan, in the county of Louth, widow, of the one part, and Denis Hughes of Dundalk, in the said county, victualler, of the other part. Whereas, by articles of agreement dated the 14th day of December, 1863, said Jane Coleman agreed to let all that the premises therein mentioned and hereinafter more particularly described, to the said Denis Hughes, as yearly tenant for the annual rent of £50, and whereas the said Jane Coleman, for herself and her heirs, executors, administrators, and assigns, has agreed with the said Denis Hughes, his executors, administrators, and assigns, to allow him to hold and occupy the undisturbed possession of the said premises, in consideration of the due payment by the said Denis Hughes of the yearly rent of £50 sterling, and in further consideration of the observance and performance of the conditions hereinafter contained. Now this indenture witnesseth that the said Jane Coleman, does agree to let, and the said Denis Hughes to take, all that house, shop, tenement, offices, and yard, situate in Roden-place, Dundalk, barony of upper Dundalk, and county of Louth (now in his possession, and that of his under-tenant Mrs. Kirley), at the yearly rent of £50, payable half-yearly on the 1st day of August and 1st day of February in every year. And the said Denis Hughes, for himself, his executors, administrators, and assigns, agrees to keep the roofs of the said house and premises in repair and water-tight, and to repair any damage which he or his servants or those under him may occasion to said house and premises, or any part thereof, at his the said Denis Hughes's own expense, and the said Denis

Ross, J. 1907. *In re* Coleman's Estate.

Hughes further agrees for himself, his executors, administrators, and assigns, that any alteration which it may be necessary for him to make for the purpose of carrying on his trade in the shop, or yard, shall be done at his own expense, such alteration to be first approved of, before being executed, by the said Jane Coleman or her agent, in writing. And the said Jane Coleman doth for herself, her heirs, executors, administrators, and assigns, agree with and to the said Denis Hughes, that so long as he the said Denis Hughes, his executors, administrators, and assigns, shall continue to well and duly pay the yearly rent at the times hereinbefore mentioned, she, the said Jane Coleman, will continue him, the said Denis Hughes, his executors, administrators, or assigns, as the tenant of the said premises, and preserve to him and them the quiet and peaceable enjoyment of same on the terms and conditions hereinbefore mentioned. And it is further agreed that the said Denis Hughes, his heirs, executors, or administrators, shall not be at liberty to set, sell, or assign, his interest in his house and premises without the consent in writing first had and obtained of the said Jane Coleman, her heirs, executors, administrators, or assigns, or her or their agent at the time being. In witness whereof the parties aforesaid have hereunto put their hands, the day and year first herein written."

At the date of the above agreement Jane Coleman was owner in fee-simple of the premises.

Denis Hughes afterwards died, and his widow, the objector, remained in possession, paying the rent.

H. Morgan Byrne, for the solicitor having carriage :—

This was at most a tenancy for the life of the lessee, and at the lessee's death became a tenancy from year to year.

Chaytor, K.C., for the objector, the tenant of the premises :—

The effect of this agreement is a grant in perpetuity. Where the habendum is to a person "so long as he pays the rent" the decisions have divided themselves into four classes, construing the tenancy to be—(*a*) a yearly tenancy : *Holmes* v. *Day* (1);

(1) Ir. R. 8 C. L. 255.

(*b*) a lease for the lessee's life: *Wood* v. *Davis* (1); *Kusel* v. *Watson* (2); (*c*) a lease for the lessors' life; (*d*) whatever interest the lessor has: *In re King's Leasehold Estates* (3). In all the reported cases the agreements contained simple personal covenants, between A and B, with no words of limitation. In the present case the agreement was intended to extend beyond the life of the parties; the use of the words "executors, administrators, and assigns" shows that it was intended to be an agreement for a lease for ever. This document should be construed as an agreement for a lease and not an actual demise, so as to carry out the intention of the parties; therefore no words of limitation in fee in the habendum were necessary: *Browne* v. *Warner* (4). The parties held on a yearly tenancy at the time. They wanted to get rid of the yearly tenancy, and therefore could not have intended to create a yearly tenancy. "Where the agreement does not specify in express words the extent of the lease, but leaves it indeterminate, except so far as it may be reasonably implied from the language used in the agreement, the tenant, when the implication is reasonable, will hold either for life, or as long as the lessor's interest continues": De Moleyns' Landowner's Guide, p. 119.

Donaldson (with him *S. L. Brown, K.C.*), for the second mortgagee, whose mortgage was subsequent in date to 1875:—

The clause against alienation is against the theory of a perpetual estate. *In re M'Naul's Estate* (5) only decides that such a covenant must be inserted in a fee-farm grant under the Renewable Leasehold Conversion Act if in the lease converted. It is merely a decision on the construction of the Act. There is no question that such a covenant is void in a common law fee-farm grant. This document is altogether uncertain. All that the parties have *said* is a lease for the life of the lessee: Coke on Littleton, p. 42 a; *Zimbler* v. *Abrahams* (6); *Mardell* v. *Curtis* (7). The use of words of limitation is immaterial. They may be mere conveyancing verbiage. Words of limitation were used in

(1) 6 L. R. Ir. 50.
(2) 11 Ch. D. 129.
(3) L. R. 16 Eq. 521.
(4) 14 Ves. 156.
(5) [1902] 1 I. R. 114.
(6) [1903] 1 K. B. 577.
(7) W. N. (1899) 93.

Ross, J. 1907.

In re COLEMAN'S ESTATE.

Holmes v. *Day* (1) ; see judgment of Morris, J., p. 239 ; yet it was there held that the agreement was for life only. The words of limitation used in connexion with the tenant, Denis Hughes, viz., executors, administrators, &c., are not appropriate to a lease for ever. If they prove that he was to have an interest beyond his own life, they would show that it was to be for lives or years—not for ever. Whose are to be the lives, or what the term of years? It may be that the explanation of the words of limitation is that the parties intended the tenancy to last for the lives of Coleman and Hughes, or whichever should last longer. They are both dead.

Jefferson, K.C., for other mortgagees prior in date to 1875, cited Woodfall's Landlord and Tenant, p. 62 ; *Roberts* v. *Tregaskis* (2).

Chaytor, K.C., in reply, pointed out that the agreement, as set out in the report of *Holmes* v. *Day* (1), did not contain any words of limitation.

Ross, J. :—

This case has been argued with great lucidity and learning by counsel on both sides. Cases on the construction of other documents are not of much assistance on the construction of this particular document. I have to construe this document, as a will is construed, on its own language.

It has been contended on one side that this document is a lease, and that no further instrument was intended to be executed. On the other hand, it has been contended that it is executory in its character. The actual words used are technical words, the exact effect of which was probably unknown to the parties. Notwithstanding the decision of Monahan, C.J., and Lawson, J., in *Holmes* v. *Day* (2), I think it is clear that something more than a year-to-year tenancy was created ; but the question as to what further estate, if any, is given is a most difficult matter. When more than a tenancy from year to year is given, and the tenancy is indefinite, it is usually construed as a tenancy for life ; it may be for the life of the lessor, or it may be for the life of the lessee.

(1) Ir. R. 8 C. L. 235. (2) 38 L. T. (N. S.) 176.

It is laid down in Co. Litt., p. 42a :—"If a man grant an estate . . . as long as the grantee dwell in such a house, or so long as he pay xl, etc., or untill the grantee be promoted to a benefice, or for any like incertaine time, which time, as Bracton saith, is *tempus indeterminatum*; in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life."

But Mr. Chaytor goes further, and contends that more than an estate for life is granted; that the estate granted is a perpetual interest. Jane Coleman had a fee-simple in the lands at the time this lease was created. The contention is that the purpose expressed on the deed was that the whole estate of Jane Coleman in the lands was to pass to the lessee. I cannot agree with that contention, for if the lessor had intended to give the fee, why did she insert the clause against alienation—a claim inconsistent with the estate contended to be granted? That clause must be struck out if Mr. Chaytor is right, and I am bound to give effect to every word in the document, and must construe it without striking out anything. I think this is almost conclusive against the contention that a fee was created. I hold that the estate the lessee got was an estate for life; but as to anything beyond that I am wholly unable to determine that any estate was given or intended to be given. I cannot agree that *In re King's Leasehold Estates* (1) is a guide here. In that case there was evidence of intention outside the document, and that case was, therefore, one on its own particular facts. I construe the present document as a lease for the life of the lessee, and the lessee having died, the interest has ceased. I over-rule the objection, but the objector must have his costs. In all cases of doubtful documents, where the parties have to come in and discuss their meaning, the same principle as to costs should be applied as in cases of ambiguous wills.

Solicitor having carriage: *C. P. O'Neill.*
Solicitor for the objector: *Robert Espinasse.*
Solicitor for the second mortgagee: *A. Henry.*
Solicitors for the first mortgagee: *Ambrose Plunkett & Co.*

D. M. S.

(1) L. R. 16 Eq. 521.

M. R. 1907.

Feb. 5, 19.

Appeal.

May 2.

O'CALLAGHAN *v.* BALROTHERY RURAL DISTRICT COUNCIL.

(1907. No. 70.)

Sanitary authority—Water supply—Power to purchase water rights otherwise than by agreement—Provisional Order—Rights "injuriously affected"—Injunction—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *sections* 202, 203, 286.

Under sections 202 and 203 of the Public Health (Ireland) Act, 1878, a sanitary authority has power, for the purpose of supplying their district with water for drinking and domestic purposes, to apply to the Local Government Board for a Provisional Order to acquire water-rights compulsorily and without the consent of a person the water supply to whose lands may be injuriously affected thereby. The remedy of such person is to petition Parliament against the Bill for confirmation of the Provisional Order, and, failing that, to apply for compensation pursuant to the said Act.

Difference between English and Irish Public Health Acts in respect of power to take water explained.

Roberts v. *Gwyrfai District Council* ([1899] 2 Ch. 608) distinguished.

INJUNCTION MOTION.

This was an action for an injunction to restrain the defendants, their servants and agents, from diverting or abstracting any water from the springs in the townland of Westerneave, parish of Killeek, barony of Nethercross, and county of Dublin, and from the Ward or Swords River in the same barony and county, or from its feeders, and from interrupting or interfering with the accustomed flow of water in the said river, through a part of the demesne and lands of Brackenstown situate in the same barony and county, of which the plaintiff is the owner and occupier, and from doing any other act or thing, whereby the supply, quality, or fall of water in the said Ward or Swords River, and in the feeders thereof, where the said river flows through or past the said demesne and lands of Brackenstown, may be injuriously affected, and from proceeding with any scheme under the Public Health (Ireland) Acts, 1878 to 1896, or the Acts incorporated therewith or otherwise, whereby

the waters of the said springs or of the said Ward or Swords River or of any of its feeders shall be taken, diverted, or abstracted, so as to injuriously affect the supply, quality, or fall of water in the said Ward or Swords River where it flows through or past the plaintiff's said demesne and lands of Brackenstown.

The plaintiff, Adelaide Matilda O'Callaghan, is tenant for life and occupier of the mansion-house, demesne, and lands of Brackenstown, situate near the town of Swords in the county of Dublin, through which demesne lands the river known as the Ward or Swords River flows, and is the sole water supply for the said mansion-house, demesne, and lands. The defendants as the sanitary authority, for the purpose of obtaining a supply of water for drinking and domestic purposes for the town of Malahide, proposed to acquire pursuant to the provisions of the Public Health (Ireland) Acts, 1878 to 1896, and Acts incorporated therewith, certain springs in the neighbouring townland of Westerneave above mentioned, the property of other persons. The plaintiff alleged that the effect of taking these springs would be to divert the water which overflowed from them at certain seasons of the year into the Swords River, and so diminish the supply of water in the said river, and injuriously affect the mansion-house, demesne, and lands of Brackenstown. The defendants alleged that the proposed taking of the springs would not affect the supply of water to the Swords River in any way, or injuriously affect the plaintiff's property.

On October 24th, 1906, the defendants served upon the plaintiff and other persons interested notice of their intention to purchase the said springs, and to present a petition to the Local Government Board for a Provisional Order to carry out the said scheme. The plaintiff refused to consent to the said scheme; and on January 12th, 1907, an inquiry into the merits of the said scheme was held at Malahide by the Engineering Inspector of the Local Government Board, in compliance with a petition for a Provisional Order presented to the Board by the defendants. The solicitor for the plaintiff objected to the Inspector proceeding with the inquiry, on the ground that section 286 of the Public Health (Ireland) Act, 1878, prohibited the sanitary authority from injuriously affecting the supply of water to the plaintiff's

M. R. 1907.

O'Callaghan v. Balrothery R. D. C.

lands without her consent. The Inspector held that under sections 202 and 203 of the said Act he had power to proceed with the inquiry. On January 21st, 1907, the writ in this action was issued, claiming an injunction in the terms above stated, and on January 24th, 1907, a notice of motion for an injunction in the same terms was served on the defendants. Affidavits were filed in support of and to resist the motion for an injunction, and by agreement it was treated as the hearing of the action. Counsel for the defendants admitted that the carrying out of this scheme involved an invasion of the plaintiff's rights to a greater or less extent, and that, were it not for the Provisional Order which the defendants sought to obtain, there would be an invasion of such rights, and the only question which calls for a report is the construction to be placed on sections 202, 203, and 286 of the Public Health (Ireland) Act, 1878.

Herbert Wilson, K.C. (*Ronan, K.C.*, and *W. G. Gibson*, with him), for the plaintiff:—

Section 202 (Power to purchase lands) provides that "Any sanitary authority may for the purposes, and subject to the provisions of, this Act purchase or take on lease, sell, or exchange any lands, whether situated within or without their district; they may also buy up any water-mill, drain, or weir, which interferes with the proper drainage of, or the supply of water to, their district; and may, for the purpose of supplying their district with water for drinking and domestic purposes, purchase either within or without their district any land covered with water, or right to take or convey water." The words from "and may" to "convey water" do not occur in section 175 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), with which this section corresponds in other respects. This power to purchase is "subject to the provisions of this Act." Section 203 (Regulations as to purchase of land) prescribes the regulations to be observed "with respect to the purchase of lands or of any of the other properties aforesaid (herein included under the term 'lands')." The words from "or of" to "lands" do not occur in section 176 of the Public Health Act, 1875. These regulations provide for the publication and serving of notices specifying the lands intended to be taken, the presentation of a

petition to the Local Government Board to put in force the compulsory powers of the Lands Clauses Acts, the holding of an inquiry, and the making of a Provisional Order by the Local Government Board empowering the sanitary authority to put in force the compulsory powers of the Lands Clauses Acts. This Provisional Order has to be confirmed by Parliament (section 214). But section 286 (saving for certain rights generally) enacts as follows:—"Nothing in this Act shall be construed to authorize any sanitary authority to injuriously affect any reservoir, canal, river, or stream, or the feeders thereof, or fall of water contained in any reservoir, canal, river, or stream, or in the feeders thereof, in cases where any body of persons or person would, if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir, canal, river, stream, feeders, or such supply, quality, or fall of water, unless the sanitary authority first obtain the consent in writing of the body of persons or person so entitled as aforesaid." This section, which corresponds with section 332 of the English Act of 1875, in terms prohibits the sanitary authority from injuriously affecting the supply of water to which the plaintiff is entitled without first obtaining her consent; that is to say, the powers conferred by sections 202 and 203 are controlled by this section, and therefore, there is no power to make a Provisional Order which will injuriously affect the plaintiff's rights. If there is no power to make a Provisional Order, the Court should interfere by injunction. [He cited *Dudden* v. *Guardians of the Clutton Union* (1); *Reg.* v. *Darlington Local Board* (2); *Mostyn* v. *Atherton* (3); *Roberts* v. *Gwyrfai District Council* (4).]

Serjeant O'Connor, *K.C.*, and *Clancy*, *K.C.*, for the defendants:—

The only question is, Are the defendants acting *ultra vires* in applying for a Provisional Order? In England a sanitary authority cannot apply for a Provisional Order to take water, but must proceed by private bill; this is owing to a defect in

(1) 1 H. & N. 627.
(2) 6 B. & S. 562.
(3) [1899] 2 Ch. 360.
(4) *Ib.* 608.

M. R. 1907. O'Callaghan v. Balrothery R. D. C.

the English Act, which has been cured in the Irish Act by the addition of the words referred to. The definition of "lands" in section 2 is the same as that in the English Act, and includes "easements and hereditaments of any tenure"; that does not include water except a water easement. It was because "lands" did not include "water" that local bodies in England could not acquire water by means of Provisional Order: Michael & Wills on Gas and Water, p. 568; note to section 176 of the Public Health Act, 1875. Section 286 does not affect the powers conferred by sections 202 and 203: if the argument of the plaintiff is correct, section 203 would be rendered nugatory by section 286. The defendants seek not merely to exercise the powers conferred by the Act, but to obtain compulsory powers by a Provisional Order, which will have to be sanctioned by Parliament. The plaintiff's remedy is to oppose the Bill in Parliament for the confirmation of the Provisional Order: section 214; and, failing that, to apply under section 274 to the arbitrator for compensation, if she can show that the supply of water to her lands is injuriously affected by the taking of the water which has been sanctioned by Parliament. No precedent has been cited for an injunction of the kind sought for. In *Roberts* v. *Gwyrfai District Council* (1), the local authority was not applying for Parliamentary powers as here.

Herbert Wilson, K.C., in reply:—

It is admitted that a Provisional Order is necessary, but it cannot be obtained unless it is *intra vires*. Section 281, which is identical with section 327 of the English Act, supports the plaintiff's contention as to the effect of section 286.

Feb. 19

THE MASTER OF THE ROLLS:—

The issues involved in this case are of importance, not only to the parties, but to sanitary authorities in general. The writ of summons claims an injunction in the following terms:—[THE MASTER OF THE ROLLS read the endorsement on the writ.] The notice of motion states the intention of the plaintiff to apply to

(1) [1899] 2 Ch. 608.

the Court for an interlocutory injunction in terms similar to the claim endorsed upon the writ of summons: but, by consent, the hearing of the motion was treated as the trial of the action, and by further consent, the issue to be determined was narrowed down to a question of the true construction of sections 202, 203, and 286 of the Public Health (Ireland) Act, 1878. I may state at once that I am of opinion, and so decide, that on the true construction of those sections the defendants are entitled to succeed in this action. There is no dispute as to the good faith of either of the parties. The plaintiff admits that the District Council are acting in the interests of the inhabitants of the town of Malahide in endeavouring to obtain for them a supply of pure water for drinking and domestic purposes. The defendants, on the other hand, admit that if sect. 286 of the Public Health (Ireland) Act, 1878, applies to the case, the plaintiff would have sufficient merits to entitle her to succeed in this particular action. But they contend that sect. 286 has no application in a case where the sanitary authority proceed under sects. 202 and 203 to obtain by means of a Provisional Order the sanction of Parliament to a scheme framed "for the purpose of supplying their district with water for drinking and domestic purposes." I agree in that contention. Sects. 202 and 203 contain provisions not to be found in the corresponding sections of the English Public Health Acts—provisions which, in my judgment, render the decisions so strongly relied upon by Mr. Wilson inapplicable to the present case. There is no doubt that, but for those provisions, the cases of *Reg.* v. *Darlington Local Board* (1), *Roberts* v. *Gwyrfai District Council* (2), and the other cases cited for the plaintiff would apply, and the plaintiff would be entitled to an injunction as claimed. In *Roberts* v. *Gwyrfai District Council* (2) Lord Lindley (then Lindley, M.R.), in giving judgment, says, at p. 615:—[THE MASTER OF THE ROLLS read from "It has been suggested" to the end of the judgment.] That case was decided under the provisions of the Public Health Act, 1875, sect. 332, which corresponds with sect. 286 of the Public Health (Ireland) Act, 1878. The result of the decision is that under sect. 332 of the Public

(1) 6 B. & S. 562. (2) [1899] 2 Ch. 608.

M. R. 1907.

O'Callaghan v. Balrothery R. D. C.

Health Act, 1875, Parliamentary powers were necessary before sect. 332 could be disregarded. But it was not argued or suggested that there was anything in sect. 332 to prohibit a sanitary authority from applying to Parliament for and obtaining Parliamentary powers to enable them to injuriously affect the rights of riparian proprietors. On the contrary, Lord Lindley in the passage I have already read says :—" There is, however, a proper mode of obtaining power to do it—namely, to apply to Parliament for authority to do it." I am of opinion that the decisions under sect. 332 of the English Act demonstrate that the true construction of sect. 286 of the Irish Act is, as contended for by Serjeant O'Connor and Mr. Clancy, viz., that nothing in this Act of itself, without further Parliamentary sanction, shall be construed to authorize any sanitary authority to injuriously affect the rights of riparian proprietors without their consent. As in *Roberts* v. *Gwyrfai District Council* (1), to which I have referred, Lord Lindley held that the Act of 1875 was not sufficient in itself to justify the action of the District Council, but that they might obtain what they wanted by applying for an Act of Parliament, so I hold that the District Council in the present case can, notwithstanding sect. 286, obtain what they want by a successful application for Parliamentary sanction to the proposed scheme. In England a sanitary authority must proceed by private bill, and obtain a local and personal Act. In Ireland, however, having regard to sects. 202 and 203 of the Act of 1878, a sanitary authority can, in my opinion, proceed by Provisional Order. Before examining these sections I may refer to *In re Local Government Board, Ex parte Kingstown Commissioners* (2), in which Palles, C.B., at p. 157, explains the nature and effect of the procedure by Provisional Order. He says :—[The Master of the Rolls read from " Before the statutes," p. 157, to " against the promoters," p. 158.]

It is satisfactory to find that my decision, though adverse to the plaintiff, cannot, in any event, have the effect of depriving her of the right to oppose the bill in Parliament, and to defeat, if she has sufficient merits, the scheme of the promoters. Now sect.

(1) [1899] 2 Ch. 608. (2) 16 L. R. Ir. 150.

202 enacts:—[THE MASTER OF THE ROLLS read to the words "to their district."] So far the section is identical with sect. 175 of 1875. But the section 202 goes on—"and may, for the purpose of supplying their district with water for drinking and domestic purposes, purchase either within or without their district any lands covered with water, or any water, or right to take or convey water." These words are not in the English Act. Sect. 203 enacts: "With respect to the purchase of lands, *or of any of the other properties aforesaid (herein included under the term 'lands')*"—the words I have emphasized are not in the English Act—"by a sanitary authority for the purposes of this Act, the following regulations shall be observed; that is to say, (1) The Lands Clauses Acts shall be incorporated with this Act except the provisions relating to access to the special Act, and except sect. 127 of the Lands Clauses Consolidation Act, 1845; (2) The sanitary authority, before putting in force any of the powers of the said Lands Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement, shall"—do certain things and take certain steps, which I need not enumerate; and then comes sub-sect. 5: "After the completion of such inquiry the Local Government Board may, by Provisional Order, empower the sanitary authority to put in force, with reference to the lands referred to in such Order, the powers of the Lands Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement or any of them, and either absolutely or with such conditions and modifications as the Board may think fit." Now the important words in sect. 203 are—"or of any of the other properties aforesaid (herein included under the term 'lands')." In my opinion, these words refer back to the words of sect. 202, to which I have called attention, and the section in so far as relates to the present case may be read: "With respect to the purchase of lands, or of any land covered with water, or any water, or right to take or convey water (all which properties are herein included under the term 'lands'), the Lands Clauses Acts shall be incorporated with this Act, and the sanitary authority may present a petition to the Local Government Board praying that the sanitary authority may, with reference to the 'lands' mentioned in the petition, be allowed to put in force the powers of the Lands

M. R. 1907.

O'Callaghan v. Balrothery R. D. C.

Clauses Acts with respect to the purchase and taking of 'lands' otherwise than by agreement . . . . and the Local Government Board may by Provisional Order empower the sanitary authority to put in force with reference to the 'lands' referred to in such Order the powers of the Lands Clauses Acts with respect to the purchase and taking of 'lands' (*i.e.* 'lands' in the enlarged and extended meaning) otherwise than by agreement or any of them, and either absolutely or with such conditions and modifications as the Board may think fit." The wording of the section might have been clearer; but I am of opinion, on the true construction of the Act, that the Legislature has not failed to carry out its real intention, and that a sanitary authority in Ireland under and by virtue of sects. 202 and 203 may proceed to acquire the right to take water, or the right to take or convey water, under the powers conferred by the Lands Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement, and (as a consequence) the right to injuriously affect the supply, quality, or fall of water in any river or stream, or in the feeders thereof, subject nevertheless to the responsibilities which arise in the case of every riparian proprietor whose "lands" (including in the term "lands" water, or the right to take or convey water) are taken or injuriously affected, and involving the consequences which flow from the compulsory taking of "lands"—again using the word "lands" in its enlarged and extended meaning.

Therefore, in my opinion, the rights of the plaintiff are not (as contended) to obtain an injunction to restrain the defendants from proceeding with their scheme under the Public Health Acts, but to oppose the Provisional Order and the Bill, if any, for its confirmation by Parliament, and, if not successful in opposition, to claim compensation under the provisions of the Lands Clauses Acts (as enlarged and extended by incorporation) for injuriously affecting the supply, quality, or fall of water in the river, where it flows through or past the plaintiff's demesne. For these reasons, I am of opinion that the action must be dismissed with costs.

W. L.

The plaintiff appealed (1).

Appeal.
1907.
O'CALLAGHAN
v.
BALROTHERY
R. D. C.
May 2.

D. S. Henry, K.C., H. Wilson, K.C., and *W. G. Gibson*, for the appellant.

Serjeant O'Connor, K.C., Clancy, K.C., and *M'Grath*, for the respondent.

THE LORD CHANCELLOR:—

We are all satisfied that the order of the Master of the Rolls is right, and that no other construction can be put on the section. Mr. Wilson's contention is that his client must be bought out, and that the purchase price was not affected by sect. 203 of the Public Health Act of 1878. I do not agree in that. What was done here was really an attempt to get an injunction against the Sanitary Authority to prevent them from proceeding by way of Provisional Order for carrying out their scheme under sect. 203. The argument of the appellant was based on sections 281 and 286 of the Public Health Act of 1878; but these sections do not apply to cases where Parliamentary powers are sought for the purpose of acquiring water rights. It is argued by Serjeant O'Connor that sect. 286 was a saving clause in case the Sanitary Authority might interfere with other rights. In my opinion, the legislation in sections 281 and 286 is quite consistent with sections 202, 203. The case of *Roberts* v. *Gwyrfai District Council* (2) does not apply. In that case the defendants had not applied to Parliament for powers to enable them to acquire the water; they had proceeded under section 51 of the English Public Health Act of 1875, and Lindley, L.J., while granting the injunction, put a stay on it for a week to enable the defendants to consider if they would apply to Parliament.

As Mr. Clancy stated to us in his very clear argument, the words at the end of clause 1 of sect. 202 were introduced into the Irish Act, after it had been decided by a Committee of the House

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

(2) [1899] 2 Ch. 608.

Appeal. 1907. O'Callaghan v. Balkothery R. D. C. The Lord Chancellor.

of Lords in 1877 in the *West Houghton Case* (1), that a Provisional Order of the Local Government Board under section 176 of the English Public Health Act for the compulsory purchase of water rights was *ultra vires*. Section 202 of the Irish Act first gave the power to acquire water rights, and section 203 gives the mode by which they are to be acquired. The Sanitary Authority is to publish in each of three consecutive weeks in November, in a newspaper circulating in the district, an advertisement describing the purposes in respect of which the lands are proposed to be taken, naming a place where the plans may be seen, and stating the lands they require. For "lands" we may read "water rights" in consequence of that clause in section 202. Then they must serve notice in December on every owner, lessee, and occupier of such lands, and require an answer whether the person served assents, dissents, or is neutral, as to the taking such lands. Then the Sanitary Authority may present a petition to the Local Government Board to put in force the powers of the Lands Clauses Acts as to purchase or taking lands otherwise than by agreement. The respondents here followed that procedure. What was done in this case was done under the advice of Mr. Clancy, who very wisely directed that the attention of the plaintiff should be called to the fact that they intended to take the water rights, and asked her if she would agree. She said that she would not agree; she would not, from any point of view, consent to this Provisional Order. In my opinion, this lady's rights are sufficiently safeguarded; but to put the matter beyond doubt we shall require the defendants to consent that they will not object to any application the appellant may make to be placed on the schedule and be heard by the arbitrator on the settlement of claims. On that consent being given, we affirm the decision of the Master of the Rolls, and dismiss the appeal with costs.

(1) Unreported. Referred to in Michael & Will on Gas and Water (5th ed.), p. 568.

FITZ GIBBON, L.J. :—

I concur. We must bear in mind that the case was reduced before the Master of the Rolls to one narrow question, and nothing more was argued before us. He said—

> "The notice of motion stated the intention of the plaintiff to apply to the Court for an interlocutory injunction in terms similar to the claim endorsed on the writ, but by consent the hearing of the motion was treated as the trial of the action, and by further consent the issue to be determined was narrowed down to the question of the true construction of sections 202, 203, and 286 of the Public Health (Ireland) Act, 1878."

On the construction of these sections, I hold that section 286 is merely protective, and that it has no application to the promotion of legislation. The judgment of Lord Lindley, in *Roberts* v. *Gwyrfai District Council* (1), shows that the Court cannot restrain public bodies from applying for Parliamentary authority to enable them to do anything that is within their rights, although they may be restrained from illegally paying the expenses of doing so. So far as this question is concerned, there is no distinction between promoting legislation by statute and doing so by Provisional Order, save that the latter is cheaper. In Ireland the Sanitary Authority can proceed by Provisional Order to acquire water, or water rights, because of the words which were added to the Irish Act to meet the difficulty caused in England by the decision that water rights were not there included in the definition of "land."

The defendants having adopted the suggestion that they should not object to the plaintiff's appearing, or making any application as she may be advised, to establish her claim, our order will recite an undertaking to that effect.

HOLMES, L.J. :—

Sections 202 and 203 of the Public Health (Ireland) Act, 1878, enable the local Sanitary Authority, for the purpose of supplying their district with water, to take steps to obtain compulsory powers to purchase water, or land covered with water, or the right to take or convey water. Mr. Wilson has argued that

(1) [1899] 2 Ch. 608.

Appeal. 1907. O'Callaghan v. Balrothery R. D. C. Holmes, L.J.

sect. 286 prevents a Sanitary Authority from taking those steps and getting compulsory powers where the consequences of their action would inflict injury on parties whose rights of water supply are not purchased from them by the Sanitary Authority. What is the meaning of sect. 286? In my opinion, the object of that section is to prevent the consequential injury which might arise from the action of a Sanitary Authority, in exercising its rights of purchase by private treaty; but the section was not intended to cripple legislation, or to curtail the action of the Sanitary Authority under sect. 203. This lady will have the right, if and when the Provisional Orders are obtained, of having the injury, or damage, she has sustained compensated. She is clearly entitled to appear before the Arbitrator for the purpose of recovering compensation for any injury she may suffer, if the scheme obtains the sanction of Parliament.

The Court made the following order:—

"The defendants undertaking not to oppose any application which the plaintiff may be advised to make in the course of the proceedings for a Provisional Order, or to the Local Government Board, or to Parliament, with the object of establishing her claim for alleged injury to her land, or water rights, by the works or taking of water proposed by the defendants in the affidavits mentioned, the Court doth dismiss the appeal."

Solicitors for the plaintiff: *O'Connor & Dudley.*
Solicitor for the defendant: *T. Early.*

R. D. M.

IN RE MICHAEL DELAHUNTY, DECEASED; O'CONNOR *v.* BUTLER.

(1906. No. 741.)

M. R. 1907. May 6. *Appeal.* June 11, 12.

Will—Construction—Beneficial interest, or trust.

A testatrix bequeathed all her property to "her dearly beloved husband," whom she appointed sole executor, "to be applied" by him to the maintenance and education of her children:—

Held, by the Court of Appeal, reversing the decision of the Master of the Rolls, that the testatrix's husband took all the property so bequeathed to him as a trustee for the children, and not beneficially.

MARIA DELAHUNTY by her will dated the 23rd day of January, 1886, provided as follows: "I will and bequeath all the property I may die possessed of, or to which I may become entitled, to my dearly beloved husband Michael Delahunty, and appoint him sole executor of the same, to be applied by him to the maintenance and education of my children."

The testatrix died the day after she had made her will, leaving three children, all of whom were then minors. Michael Delahunty, who was in embarrassed circumstances, survived his wife, and subsequently died.

The plaintiff in this suit, claiming to be a creditor of the said Michael Delahunty, obtained a decree for the administration of his personal estate, and, certain difficulties having arisen in the course of the administration, a summons was brought for the determination (*inter alia*) of the question whether on the true construction of the will of Maria Delahunty the property thereby bequeathed formed portion of the assets of Michael Delahunty, or passed to the children of the marriage.

The Hon. Cecil Atkinson, for the plaintiff.

M'Gusty, for the executors of Michael Delahunty.

Jefferson, K.C., for the children of Michael and Maria Delahunty.

M. R. 1907.

O'Connor v. Butler.

The Master of the Rolls:—

The testatrix here, being, as she states in her will, in delicate health, disposed of all her property in a few short lines.

I am inclined to think that if this suit had not been instituted by administration summons, the discussion as to the true meaning of the will, having regard to the long line of authorities, on both sides, might have been prolonged indefinitely. There is no branch of the law which is more fruitful in conflicting authorities than that relating to gifts, such as the gift in the present case, where the Court is called upon to decide whether the gift was meant or intended to be—(1) an absolute gift to the legatee, coupled with an expression of the motive of the gift; or (2) a gift to the legatee merely as trustee conferring no beneficial interest whatever upon the legatee named, but, on the contrary, dedicating the property to or for the benefit of the *cestui que trusts*, i.e. according to Mr. Jefferson's argument, the children of the testatrix in the present case; or (3) a gift to the legatee partly for his or her own benefit, and partly for the benefit of others, *e.g.* children or nephew and nieces. But when all is said and done, the Court has to construe the will itself, and, in my opinion, in this particular will, the testatrix has so expressed herself, that the Court should hold that her "dearly beloved" husband took an absolute interest in all her property unaffected by any trust in favour of the children, and that the words relied on by Mr. Jefferson, "to be applied by him to the maintenance and education of my children," are, in fact, words which express the motive of the gift, and explain the object and intention of the testatrix in selecting her husband as her devisee and legatee, and nothing more. The case of *In re Haly's Trusts* (1), which at first sight appears potent authority in favour of Mr. Jefferson's contention, is in one aspect an authority adverse to him. Mr. Jefferson referred to the judgment of Naish, L.J., in the Court of Appeal, but, in my view, the concluding words of that judgment are adverse to Mr. Jefferson's contention, "It is a case of a bequest to a woman of a sum of money by words which vest it in her absolutely, but to which are added words directing, in terms of a mandatory

(1) 23 L. R. Ir. 130.

character, the use to which it is to be put by her." So far the judgment is entirely in favour of Mr. Jefferson; but the learned Judge goes on—"There is here a dedication of the capital of the fund for the use of the children in shares to be fixed by their mother."

The Vice-Chancellor, from whose decision the appeal was taken unsuccessfully, decided the case after a review of the authorities, and says at p. 133, "In the case of *In re Adams and the Kensington Vestry* (1), there was also an express gift to the absolute use of the testator's wife, her heirs, executors, administrators, and assigns, and an expression of the testator's reason and motive for such absolute gift, namely, the full confidence that she would do what was right as to the disposal of it between the children. These cases appear to me, for the reasons I have expressed, to be distinguishable from the present. I have more difficulty in dealing with *Mackett* v. *Mackett* (2), which more closely resembles the present. The gift there was to the wife, to and for her own proper use and benefit *for ever*, which words seem to preclude the giving her a life interest only. The words 'the proceeds to be applied by her in the bringing up and maintenance of' the children, tend also to show that the *corpus* of the gift was not intended to be for the benefit of the children, and to strengthen the view that the gift of the *corpus* to the wife was absolute, and were held to be only an expression of the motive of the gift." It seems to me that the case of *In re Haly's Trusts* (3) was decided upon the ground that the intention of the testator to dedicate the *corpus* of the gift for the use of the children was clearly expressed upon the face of the will, while in *Mackett* v. *Mackett* (2), where the words relied on were "and the proceeds to be applied by her in the bringing up and maintenance of the said John Mackett and all other the children of the said Sarah Mackett," the words were held merely to express the motive of the gift. These words are as near as possible to those of the will of the present case. I think that if the Vice-Chancellor was deciding this case to-day, his decision would be the same as mine, and for the same reasons. The words "to be applied by him to the maintenance and education of my children" tend to

(1) 27 Ch. D. 394. (2) L. R. 14 Eq. 49. (3) 23 L. R. Ir. 130.

M. R. 1907.

O'Connor v. Butler.

show, in my view at all events, that the *corpus* of the gift was not dedicated to the children. If the testatrix meant that the *corpus* was to go to the children, she would have used different words. Without saying that *Mackett* v. *Mackett* (1) and *Bond* v. *Dickenson* (2) rule this case, my opinion is that they assist the Court in arriving at its decision, and that decision is that the property passed to the husband unaffected by any trust.

W. L.

Appeal. June 11, 12.

The children appealed (3).

Jefferson, K.C., for the appellants:—

The words "my dearly beloved husband" do not show that it was the intention of the testatrix to benefit her husband. To apply to an object means to appropriate to that object. These words are mandatory, and negative any intention to benefit the husband personally. The latter took merely as a trustee for his children: Theobald (6th ed.), p. 476. *In re Haly's Trusts* (4) is a clear decision in my favour. This is not a trust to be inferred from precatory words, but an actual trust. [He also referred to *In re Adams and the Kensington Vestry* (5).]

M'Gusty, for the executors of Michael Delahunty:—

This was an absolute gift to the husband. The words "to be applied," &c., only indicate the purpose of the gift: *Bond* v. *Dickinson* (2). An indication of the motive of the testator in making the gift will not raise a trust: *Byrne* v. *Blackburn* (6); *Mackett* v. *Mackett* (1).

The Hon. Cecil Atkinson, for the plaintiff in the action, cited *Wilson* v. *Bell* (7); *Leigh* v. *Leigh* (8); *M'Alinden* v. *M'Alinden* (9); *French* v. *Hamilton* (10).

(1) L. R. 14 Eq. 49.
(2) 33 L. T. (N. S.) 221.
(3) In the Court of Appeal, before Sir Samuel Walker, C., and Fitz-Gibbon and Holmes, L.JJ.
(4) 23 L. R. Ir. 130.
(5) 27 Ch. D. 394.
(6) 26 Beav. 41.
(7) L. R. 4 Ch. App. 581.
(8) 12 Jur. 907.
(9) I. R. 11 Eq. 219.
(10) [1895] 2 Ch. 370.

The Lord Chancellor:—

We have arrived at an opinion different from that of the Master of the Rolls on the construction of this will. The testatrix left all her property to her "dearly beloved" husband, Michael Delahunty, "to be applied" by him to the maintenance and education of her children. It has been contended before us that under those words Michael Delahunty took an absolute interest.

Apart from authority (and none of the cases cited have given us much assistance) the words "to be applied" must be taken to mean, not that the husband should be at liberty to put the money into his own pocket, but that he should apply it in the way specified, and not in any other way; "to apply to" means "to appropriate to," and I think the words imply an obligation on their very face.

The trust or obligation which arises in this case, according to our judgment, might have been negatived in several ways, as by the words of gift in the first instance. Thus, where there are words primarily giving the donee the property absolutely, and for his own proper use, such words express more than a mere gift, and accordingly vest the property in the donee beneficially, because the very form of the words implies rights in the property.

Again the trust may be negatived by the very words alleged to create the trust; if these are words of mere request, or are merely expressive of the motive for the gift, the trust will not arise. It is also an element to be considered in all the cases if the alleged trustee is himself or herself one of the beneficial objects of the direction.

In the present case the Master of the Rolls relied upon *Mackett* v. *Mackett* (1), the strongest case in support of his view. There a testator gave his personal property by his will to a married woman, "to and for her own proper use and benefit for ever," and directed that all the proceeds should be applied by her in the bringing up and maintenance of all her children. Sir James Bacon, V.-C., decided that the woman took an absolute interest. He founded his judgment on the primary gift, which was made, without qualification, for her sole and separate use; there

(1) L. R. 14 Eq. 49.

Appeal. 1907.

O'Connor v. Butler.

The Lord Chancellor.

was no restriction laid on the legatee; it was not merely a simple gift, but an absolute gift in words expressing absolute property; and the Vice-Chancellor reconciled his judgment with the direction as to the application of the proceeds by saying that the direction was only an expression of the motive for the gift.

In *Lambe* v. *Eames* (1), a testator gave property to his widow "to be at her disposal" in any way she might think best for the benefit of herself and family. It was there held that the words used were inconsistent with anything but an absolute property in the widow. Here we have, not a gift to the husband for his own use, but a mere gift "to be applied" in a certain way—words which have always imported an obligation.

We are of opinion that there was an obligation upon the husband to apply this property as directed; that he was not constituted absolute owner of it; and, therefore, this appeal must be allowed.

Fitz Gibbon, L.J.:—

Probably there is no subject upon which there is a greater wilderness of authority than that now before us; and that wilderness is a desert, where the words of the particular instrument under consideration require no interpretation, and where no principle of law governs its construction.

I cannot conceive words simpler, shorter, or less technical than those which this testatrix has used to express her intention—whatever that may have been—

> "I will and bequeath all the property I may die possessed of to my dearly beloved husband, Michael Delahunty, to be applied by him to the maintenance and education of my children."

The words which declare how the property given is "to be applied" are co-extensive with the gift—*all* is "to be applied" in the way prescribed. Unless these words prescribing the application are to be absolutely rejected, applying as they do to the entire property, they must govern the application of that property, and they impose on the person to whom the property is given an

(1) L. R. 6 Ch. App. 597.

obligation co-extensive with the gift. To say more about the terms of the gift, is either to paraphrase the words of the will, or to explain at length what has been already said in the simplest words.

The Master of the Rolls seems to have been impressed by the words "dearly beloved." But if the wife had said "to my dearly beloved but embarrassed husband," or "to my dearly beloved husband, whose means are limited," and if those words were true, she would have plainly shown that, through affection for him, she gave him her property to be applied in discharging what was primarily his duty towards their children—namely to maintain and educate them. But he would be bound so to apply it; and saying that he was "dearly beloved" can neither make him a beneficiary, nor relieve him from the obligation to apply the property as his wife directed. If the words "to be applied" do not declare the purpose to which the money is to be applied, they mean nothing. They do not declare any vague or general purpose. This case is not complicated by the circumstance—so common in cases of gifts to wives—that the donee, as well as the children, is a beneficiary. This property is to be applied, not generally for the benefit of the children, nor of their father, but "to the maintenance and education of my children." If she had mentioned "*education*" only, could the husband have escaped from the obligation to apply his wife's property to get for her children some better education than that which he would otherwise have provided for them? If the gift had been to anyone but her husband, if it had been "to my dearly beloved sister," or "to my dearest friend," could the donee have taken it beneficially? If the husband married again, could he have treated the children of his first marriage as having no claim upon their mother's property, as against himself, or a second family? The fact that he was the husband, so far from making it more probable that he was intended to take the property for himself, has the opposite effect; for it leads me to think that the money was given to him by his wife, knowing that he was already under the obligation to maintain and educate his children; and she wanted to help him by giving him money to do so, but she safeguarded her children by directing its application to that purpose.

Appeal. 1907. O'Connor v. Butler.

For these reasons it appears to me that the testatrix could not have used more apt words to impose an obligation for the benefit of her children, co-extensive with the gift; and we must declare that the property which she gave is not assets of her husband.

Holmes, L.J. :—

This seems to me a clear case. This lady on the last day of her life, at the time expecting to die soon, and in fact dying on the next day, gets this very simple will made for her. If she had wanted to give her husband the property out and out, it would not have been necessary for her to make a will at all, and it would have gone to him in the ordinary course of law. The will was made, and in a very concise form. The critical words are "to be applied to the maintenance and education of my children."

It seems to me that to adopt the argument contended for by the respondents would necessitate either of two things, either to strike out these words "to be applied" altogether, or to give to them an artificial meaning such as they do not ordinarily bear.

That being so, we must allow the appeal.

Solicitor for the appellants: *Roger Green.*
Solicitor for the plaintiff: *David Dunne.*
Solicitors for the defendant: *Fred Sutton & Company.*

R. ST. J. C.

INDEX.

ABSOLUTE INTEREST—Personalty—Estate tail - - - - - - - 73
See ESTATE FOR LIFE.

ABSOLUTE ORDER FOR SALE—*Lis pendens*—Sale by mortgagee - - 76
See MORTGAGE.

—— Subsequent incumbrance - - 15
See LIMITATIONS, STATUTE OF. 1.

—— Tenant under Court letting — Dismissal of petition - - - - - - 49
See DISMISSAL OF PETITION.

ACCOMMODATION LAND — Town-park — Evidence - - - - - - 180
See TOWN-PARK. 1.

ACCRUER OF RIGHT — Breach of trust — Legacy - - - - - 275, 282
See LIMITATIONS, STATUTE OF. 2.

ADMINISTRATION ACTION—*Costs of personal representative in default to the estate—Solicitor for defaulting administrator.*] A personal representative, who has been ordered, in an administration suit, to bring in money due by him to the estate, will not be allowed any costs in the suit until he has complied with the order. His solicitor cannot be in any better position, and will not be allowed credit for such costs, in accounting for moneys received by him as such solicitor, until his client has brought in the balance due by him. *In re O'Kean, deceased*; *Ferris* v. *O'Kean*
[BARTON, J., 223; APP. 225

2. —— *Practice — Transfer and consolidation — Carriage of proceedings—R. S. C.*, 1905, *Ord. V., R.* 2; *Ord. XLIX., Rr.* 3, 9.] As a general rule, when two summonses for administration of the same estate are brought in different branches of the Chancery Division, the plaintiff who issued his summons first is entitled to the carriage of the proceedings for administration, and to have the other summons stayed, or transferred and consolidated. *In re Dunne, deceased*; *Lynch* v. *Dunne*; *Hume* v. *Dunne* - - - - M. R. 202

—— Transfer to County Court — Value of personalty, when to be ascertained . 327
See COUNTY COURT. 2.

ADMINISTRATOR — Notice before grant — Mortgagee of assets - - - 321
See PRIORITY. 2.

ADVERTISEMENT—Company—Alteration of memorandum of association—Petition
See COMPANY. [237

AFTER-ACQUIRED PROPERTY — Settlement—Bonus - - - - - 51
See BONUS. 1.

AGENT—Fraudulent misappropriation — Mortgage executed with blanks - - 339
See FRAUD.

AGREEMENT FOR LEASE - - 488
See LEASE.

ALTERATION IN MEMORANDUM OF ASSOCIATION—Bank—Power to act as trustee and executor - - 237
See COMPANY.

ANNUITY—*Duration—Terminable or perpetual—Marriage settlement.*] By marriage settlement *L. R.*, being entitled to certain lands, held under a bishop's lease for twenty-one years, customarily renewable, and also to certain other lands, held under a lease for a term of sixty-one years, demised the former to the trustees of the settlement for the term of 100 years, and the latter for a term of thirty years, upon trust after the solemnization of the intended marriage for the said *L. R.* and his assigns, during the residue of the said terms of 100 years and thirty years, if he should so long live; and from and after the decease of the said *L. R.*, during the continuance of the said terms, in trust to permit *T. O'N.* (the intended wife), if she should survivé the said *L. R.*, yearly, during as many years of the said terms as she should survive the said *L. R.*, to have, receive, and take out of the said premises an annual sum or yearly rentcharge of £300, to be charged and chargeable on the said lands for ever, in trust, after the decease of the said *T. O'N.*, for the issue of the marriage, in such shares as the said *L. R.* and *T. O'N.* should appoint; and in default of appointment, share and share alike. The lands comprised in the said bishop's lease were subsequently conveyed to the said *L. R.* in fee-simple. *Held*, that the annuity was terminable by

ANNUITY—*continued.*
the expiration of the terms vested in the trustees. *In re Finlay's Estate* - - WYLIE, J., 24

2. —— *Will—Construction— Use upon a use—Express trust—Statute of Limitations.*] A "rent" may be created after a use, so as not to transgress the rule that a use cannot be limited upon a use. The gift of a "rent" by a limitation of a use upon a use does not necessarily create a trust or equitable estate, but may create a new legal estate, and give the seisin in the "rent" to the annuitant, and such a "rent" will not be deemed a "use upon a use." A testatrix, after bequeathing a sum of £1200, charged on certain lands, to three of her daughters, devised the lands to two of them, Anne *H.* and Alice *H.*, in the following terms:—"To hold the same *unto and to the use* of said Anne *H.* and Alice *H.*, their heirs and assigns, for ever, to the uses and upon the trusts, and subject to the bequests and charges hereinafter mentioned and expressed—that is to say: *To the use and intent* that my daughter Agnes and her assigns may yearly and every year during her life receive an annuity of £25, to be charged upon and issuing out of the said lands." After providing for the days of payment, the testatrix gave "full powers to said Agnes and her assigns to distrain for arrears of said annuity." In a subsequent clause a second annuity was given to same annuitant in terms which admittedly amounted to an express trust. Since 1879 no payment had been made on foot of the first annuity, and there was no acknowledgment in writing sufficient to satisfy the Statute of Limitations:—*Held*, by the Court of Appeal (affirming the judgment of Barton, J.), that, applying the rule above stated, there was a gift of a legal rentcharge, which should not be deemed a use upon a use; and that, inasmuch as there was no duty or obligation imposed on the trustees of the will in reference thereto, the annuity was not secured by any trust, express or otherwise, and, in the absence of anything which, in the opinion of the Court, would amount to fraud, was barred by the Statute of Limitations. *Quære*: Whether, assuming that the annuity was secured by an express trust, it would be a "sum of money charged upon or payable out of any land or rent or a legacy" within the meaning of section 10 of the Real Property Limitation Act, 1874, in which case it would have been barred by the statute; or whether it would be an annuity charged on land, included in the definition of "rent" in sect. 1 of the Real Property Limitation Act, 1833, in which case it would have been saved from the statutory bar by the operation of sect. 25 of that Act, coupled with the provisions of sect. 28 (2) of the Judicature (Ireland) Act, 1877. *Hanly v. Carroll* BARTON, J., 166; APP. 176

—— Sale subject to jointure - - 380, 388
See JOINTURE.

ANNUITY—*continued.*
—— Settlement—Construction—Option to purchase at a time unlimited—Rule against perpetuities - - - 194, 292
See PERPETUITY.

APPORTIONMENT — Rent — Redemption — Priority as regards indemnifying lands—59 & 60 Vict. c. 47, s. 33 (4) 190, 311
See REDEMPTION.

ARREARS OF RENT—Included in purchase-price—Bonus - - - 116, 124
See LAND LAW (IRELAND) ACTS. 1.

BAILIFF — Infant — Possession — Statute of Limitations - - - - 393
See INFANT. 1.

BANK—Memorandum of Association—Alteration — Power to act as trustee and executor - - - - - 237
See COMPANY.

BEQUEST
See LEGACY.

BLANKS—In deed—Fraud in filling up 339
See FRAUD.

BOARD OF PUBLIC WORKS — Charge — Proceeds of sale insufficient to meet—Bonus - - - - - 148
See BONUS. 3.

BONUS — *Agreement to settle after-acquired property "not hereinbefore settled"—Marriage settlement—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Irish Land Act*, 1904 (4 *Edw.* 7, *c.* 34), *s.* 3.] By marriage settlement certain funds, consisting of Government stock, were (*inter alia*) settled, upon trust to pay the income to *F. M. P.* (the wife) for life, then to *J. P.* (the husband) for life, with limitations over. The settlement contained a power to the trustees to invest the trust funds in the purchase of land, and to sell again and re-invest, the rents and profits to be applied in the same manner as the income from the trust funds; and also contained this clause:—"It is hereby agreed and declared that the real and personal property (if any) *not hereinbefore settled*, to which the said *F. M. P.* at the time of the said intended marriage, or she, or the said *J. P.* in her right, at any time during her now intended coverture, shall be or become entitled, whether in possession, reversion, or otherwise" (except certain specified articles of jewellery, &c.), "shall . . . be assured and transferred . . . to the trustees, . . . to be held upon the same trusts as the settled funds." In pursuance of the power vested in them, the trustees sold portion of the settled funds, and invested the proceeds in the purchase of certain lands, which were subsequently sold by *F. M. P.* under the Irish Land Act, 1903. On a question arising as to whether the percentage payable under section 48 of the said Act and section 3 of the Irish Land Act, 1904,

BONUS—*continued.*
was captured by the above clause in the settlement:—*Held*, that the percentage was payable to *F. M. P.*, and was not captured by the clause in question. *In re Power's Estate* WYLIE, J., 51

2. —— *Assignment of life estate — Vendors—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 50—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48.] Where a settled estate was sold under the Irish Land Act, 1903, the vendors being the assignee for value of the tenant for life and the tenant for life under the settlement:—*Held*, that the bonus was payable to the tenant for life under the settlement. *In re Roberts' Estate* [WYLIE, J., 483 [Rev.]

3. —— *Estate insolvent as to capital and income — Order for sale in force at passing of Land Act of* 1903—*Portion of estate purchased solvent as to income—Percentage under sect.* 48 *of Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *payable to vendor.*] At the date of the passing of the Land Act, 1903 (3 Edw. 7, c. 37), an absolute order for sale by the Land Judge was in force in respect of the estate of *O.*, which was then insolvent both as to capital and as to income. In 1904 a portion of the estate was sold by the Land Judge to *C.*, who re-sold the same to the occupying tenants, under the Act of 1903. The estate in the ownership of *C.* was solvent as to income; but, on a sale by *C.* to the tenants, the purchase-money, after redemption of superior interests, proved insufficient to discharge the redemption value of a Board of Works loan:—*Held* (affirming the decision of Ross, J.), that the percentage on the purchase-money under section 48 of the Land Act, 1903, was payable to *C.*'s executors. *In re Carroll's Estate* - - - - - - - APP. 148

4. —— "*Estate so incumbered that the vendor is not entitled to receive for his own use any part of the rents or profits thereof*"—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48, *sub-s.* 1—*Proviso—Temporary insolvency as to income—Date of ascertainment.*] "Estate," in the proviso to s. 48, sub-s. 1, of the Irish Land Act, 1903—"where an estate is so incumbered"—means the estate as defined in sect. 98. Solvency as to income at the date of sale is the test to be applied in considering whether an estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents and profits thereof; and the fact that a receiver has been appointed for the purpose of (*inter alia*) paying off arrears of interest, the existence of which makes the estate at the date of sale temporarily insolvent as to income, does not bring the case within the proviso. *In re Earl of Bandon's Estate* - - - - - WYLIE, J., 226

5. —— *Insolvent estate — Owner of estate also owner of a charge—Percentage under Irish Land Act*, 1903, (3 *Edw.* 7, *c.* 37), *s.* 48.] *H.* was the owner of a fee-simple estate, subject to two charges created by the will of a former owner, one of £1330 in favour of *H.*, and the other of £2500 in favour of his sister. An absolute order for sale had been made by the Land Judge, and was in force at the date of the passing of the Land Act, 1903. After the passing of the Act of 1903 the petition for sale was dismissed, and the estate was sold to the tenants under the Land Act of 1903. The purchase-money was insufficient to pay off the two charges:—*Held* (by Sir Samuel Walker, C., and FitzGibbon, L.J.; *dissentiente* Holmes, L.J.), affirming the decision of Ross, J., that, having regard to the position of *H.* as owner of the charge, the vendor was entitled to the percentage under sect. 48 of the Land Act, 1903. *In re Holmes' Estate* - - Ross, J., 1; APP. 139

—— Arrears of rent included in purchase price [116, 124

See LAND LAW (IRELAND) ACTS. 1.

—— Settled Land Acts—Person deemed to be tenant for life—Leave to sell - 305

See SETTLED LAND ACTS. 2.

CASES:

—— *Colclough's Estate, In re* (8 Ir. Ch. R. 330) considered - - - - - 15

See LIMITATIONS, STATUTE OF. 1.

—— *Daly* v. *Wright* (32 L. R. I. 9) discussed and adhered to - - - - - 363

See TOWN-PARK. 2.

—— *Howe* v. *Lord Dartmouth* (7 Ves. 137), rule in applied - - - - - 32

See CONVERSION. 2.

—— *Iever, In re* ([1904] 1 I. R. 492), adopted and applied - - - - - 305

See SETTLED LAND ACTS. 2.

—— *Kildare* v. *Fisher* (1 Str. 71) applied 411, 421

See TURF.

—— *Macnamara* v. *Macnamara* (32 L. R. I. 1) discussed and adhered to - - 363

See TOWN-PARK. 2.

—— *Nixon's Estate, In re* (Ir R. 9 Eq. 7) considered - - - - - - 15

See LIMITATIONS, STATUTE OF. 1.

—— *Roberts* v. *Gwyrfai District Council* ([1899] 2 Ch. 608) distinguished - 494, 503

See COMPULSORY PURCHASE.

—— *Scanton's Estate, In re* ([1898] 1 Ir. R. 157) followed - - - - - 15

See LIMITATIONS, STATUTE OF. 1.

CHARITY—*Gift of land—Will—Republication by subsequent codicil—Death of testator within three months—Validity of gift*—7 & 8 *Vict. c.* 97, *s.* 16.] A charitable gift of land is not invalidated merely by the fact that the will containing it is confirmed and republished by a codicil made less than three months before the death. A testator, by a will executed more than three months prior to his death

CHARITY—*continued.*
devised the residue of his property, consisting partly of lands, to a charity. By two codicils, both executed less than three months prior to his death, the testator made some additional bequests in favour of certain persons, the only effect of which, as regards the residue, was to reduce it, and otherwise he confirmed his will:—*Held*, that the devise of the lands for charitable purposes was not invalidated. *In re Moore, deceased*; *Long* v. *Moore*
[BARTON, J., 315

2. —— *Trust for support and education—Objects to have specified names—Perpetuity—Uncertainty—Will—Construction—Charitable bequest.*] A testator devised all his real and personal estate to trustees, upon trust "to pay towards the support and education in Ireland of any Roman Catholic boy or boys, man or men, of the surname of O'Laverty or Laverty, O'Lafferty or Lafferty, being between the ages of eleven years complete and twenty-three years complete, until such boy or man shall have obtained a trade or profession, such sums as said trustees may think proper." Absolute discretion was given to the trustees as to the selection of recipients and the discontinuance of any payment to them for their "support or education." They were also empowered to accumulate and invest the interest, the profits of which were to be applied "in the same manner as those of the original shares or funds, viz. for the support of boys or men of the above-mentioned surnames, under the circumstances before mentioned"—*Held*, that the gift was not charitable, and therefore failed. *Laverty* v. *Laverty*
[BARTON, J., 9

—— Annuity to—Option to purchase 194, 292
See PERPETUITY.

CHURCH PROPERTY—*Presbyterian church—Lease of premises on which church is built to trustees for the congregation—Advances to complete building of church—Lien on church property—Decree for sale.*] A congregation, in accordance with the Laws and Constitution of the Presbyterian Church of Ireland, was formed in 1897, at Bangor, in the county of Down, and they proceeded to build a church and manse. A lease was made of ground suitable for the building on the 12th December, 1899, to *J. B.*, *S. G. M.*, *J. N.*, and *J. M.*, for 999 years, upon trust for the congregation, so long as the same should remain under the jurisdiction of the General Assembly of the said Church, and profess and maintain the doctrines of the Westminster Confession of Faith. The building had been proceeded with, and the church was opened in September, 1899. A large amount of money had been subscribed from time to time to pay for the building of the church and the manse; but a further sum being required, the Board of Deacons at a meeting on the 30th May, 1900, approved of an overdraft from the bank for £4000, and appointed the plaintiffs, *J. B.* and *H. B.*, and the defendants, *S. G. M.*, *J. N.*, and *J. M.*, to act as guarantors on behalf of the congregation. The guarantee was given, and payments had been made to the bank in reduction of the overdraft, leaving a balance of £2726 due. The plaintiffs were obliged to pay this amount. The three defendants, *S. G. M.*, and *J. N.*, and *J. M.*, paid to the plaintiffs their proportion, leaving £1900 to be borne by the plaintiffs. This debt was treated as a congregational debt in the annual accounts of the church property. *J. B.* and *H. B.* brought an action against the Board of Deacons, and the trustees for the congregation, to raise the amount by a sale of, and receiver over, the property comprised in the lease of the 12th December, 1899:—*Held* (reversing the decision of Barton, J.), that a Court of Equity would not enforce payment by sale of property the subject of a trust, when such proceedings would destroy the trust. *Bowman* v. *Hill*
[APP. 451

CHURCH PROPERTY—*continued.*

CODICIL—Republication of will — Charitable devise - - - - - - 315
See CHARITY. 1.

COMPANY — *Memorandum of association — Alteration of objects—Extension to new business—Bank—Power to act as trustee and executor—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1—*Practice—Petition—Advertisement of.*] A company, carrying on the ordinary business of bankers, petitioned the Court to confirm a resolution, passed unanimously, to alter its memorandum of association by empowering it to undertake the execution of trusts, and to act as executor or administrator, or as trustee or treasurer. The application was opposed by seven shareholders, who were solicitors, on the ground that the alteration would not be beneficial to the shareholders, and would be injurious to the solicitors' profession. The Court confirmed the alteration, with the modification that the powers were not to be exercised unless some part of the trust property was situate within the jurisdiction of the Court. Immediately after the presentation of a petition under the above Act a summons should be taken out to have a day fixed for the hearing of the petition, and directions given for advertising the presentation of the petition, in accordance with the practice stated in Palmer's Company Precedents (1906 edition), part i., p. 1163. *In re Munster and Leinster Bank, Limited* - - - M. R. 237

—— Registration under Companies Acts—Dentists—Fraud - - - - - 252, 471
See DENTIST. 1, 2.

—— Unregistered—Winding up - - 98
See WINDING UP.

COMPULSORY PURCHASE—*Sanitary authority—Water supply—Power to purchase water rights otherwise than by agreement — Provisional Order—Rights "injuriously affected"—Injunction—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *sections* 202, 203, 286.] Under sections 202 and 203 of the Public Health (Ireland) Act, 1878, a sanitary authority has power, for the purpose of supplying their district with water for drinking and domestic purposes, to apply to the Local Government Board for a Provisional Order to acquire water rights compulsorily and without the consent of a person the water supply to whose lands may be injuriously affected thereby. The remedy of such person is to petition Parliament against the Bill for confirmation of the Provisional Order, and, failing that, to apply for compensation pursuant to the said Act. Difference between English and Irish Public Health Acts in respect of power to take water explained. *Roberts* v. *Gwyrfai District Council* ([1899] 2 Ch. 608) distinguished. *O'Callaghan* v. *Balrothery Rural District Council* [M. R. 494; App. 503

CONGESTED DISTRICTS BOARD—Sale to —Negotiation fee —Practice—Land Commission - - - - - - 361
See Negotiation Fee.

CONGREGATION — Presbyterian — Lease for church buildings — Guarantee by trustees—Lien—Decree for sale - 451
See Church Property.

CONSPIRACY —*Wrongful acts— Injury — Injunction.*] The House of Lords affirmed the judgment of the Court of Appeal, [1906] I. R. 92, holding that there was no evidence of conspiracy on the part of the respondent to injure the appellant, or unlawfully to induce persons to withdraw their children from the school in which the appellant was a teacher. *Sweeney* v. *Coote* H. L. 233

CONSTRUCTION OF STATUTE—Incorporation of plans - - - - - 152
See Plans.

CONTEXT—Will—Supplying words . 440
See Supplying Words.

CONVERSION — *Land Purchase Acts — Irish Land Act*, 1903—*Agreement for sale in the prescribed form—Absence of time limit—Rule against perpetuities.*] The fact that, in an agreement for sale under the Irish Land Act, 1903, in the prescribed form, there is no limit of time fixed within which the conditions on which the carrying out of the agreement depends are to be performed, does not render the agreement void as violating the rule against perpetuities. Where an agreement for the sale of an estate to the occupying tenants direct, under the Irish Land Act, 1903, had been entered into by two co-owners entitled as tenants in common, one of whom died before the agreement, which was subsequently carried out, had been sanctioned by

CONVERSION—*continued.*
the Estates Commissioners :—*Held*, that the moiety of the deceased co-owner had been converted into personalty at the date of her death. *In re Doyle's Estate* - - - - - Wylie, J., 204

2. —— *Will—Construction—Tenant for life and remainderman — Wasting property.*] A testatrix, after certain specific legacies, left the rest and remainder of her property of every kind, both real and personal (which included leaseholds), to her trustees, upon trust to pay *A* an annuity of £250, and directed the remainder of the income to be derived from her said property, or the investments representing the same, to be paid to her husband during his life, and after his decease to *B*, *C*, and *D*, in certain shares. She directed that, in the event of *A* dying without issue, the incomes so provided for should be increased by the amount of his annuity ; but that, if *A* died leaving issue, the said annuity should be paid for the benefit of his child or children, until he or they attained the age of twenty-one years, when, out of all her said property, a sum of £4000 was to be raised, and distributed as directed in the said will. Subject thereto, the testatrix gave all her property to *B*, *C*, and *D*, in certain shares. *Held*, that there was no sufficient indication of intention on the part of the testatrix that the property should be enjoyed *in specie*, to exclude the application of the rule of law laid down in *Howe* v. *Lord Dartmouth* (7 Ves. 137), and that the property should be converted for the benefit of those entitled in remainder. *In re Harris, deceased*; *Lyons* v. *Harris* - App. 32

COSTS—Administration action— Defaulting personal representative—Solicitor 223, 225
See Administration Action. 1.

—— Leave to sell—Settled Land Act, 1884, s. 7 (ii.) - - - - - - 305
See Settled Land Acts. 2.

—— Negotiation fee—Sale to Congested Districts Board - - - - - - 361
See Negotiation Fee.

—— Special defendants—Fraudulent company—Evasion of Statute—Winding up 252
See Dentist. 1.

—— Taxation.
See Taxation of Costs.

COUNSEL—Number of—Fees, 85, 88, 422, 434
See Taxation of Costs. 1, 2.

COUNTY COURT—*Practice—Transfer—Action to set aside agreement for sale of lands—Valuation over* £30 — *Purchase-money under* £500 — *Plaintiff not a party to agreement—Jurisdiction*—40 & 41 *Vict. c.* 56, *s.* 33, *sub-s.* (d)—45 & 46 *Vict. c.* 31, *s.* 10, *sub-s.* (b).] Where a person brings an action to set aside an agreement for the sale of lands, to which he is not a party, on the ground of fraud and undervalue, and the valuation of the lands exceeds £30, the Court has no jurisdiction to

COUNTY COURT—*continued.*
transfer the case to the County Court, although the purchase-money does not exceed £500, under the 40 & 41 Vict. c. 56, s. 33, sub-s. (*d*). In such a case the jurisdiction of the County Court arises under the 45 & 46 Vict. c. 31, s. 10, sub-s. (*b*), and cannot be exercised where the valuation of the lands exceeds £30. *Miller* v. *Hatrick*
[Barton, J., 82; App. 84

2. —— *Practice—Transfer—Administration suit — Jurisdiction — Personalty, value of — County Officers and Courts (Ireland) Act,* 1877 (40 & 41 *Vict. c.* 56), *sections* 33 *and* 36.] There is no jurisdiction, even on consent, under section 36 of the County Officers and Courts (Ireland) Act, 1877, to transfer an administration suit from the High Court to the Civil-bill Court, if the personalty exceed £500 in amount or value at the time of the commencement of the suit, although under that limit at the death of the person whose estate is to be administered. The institution of the proceedings, and not the death of the testator or intestate, is the date at which the value of assets determining the jurisdiction to transfer is to be ascertained. *In re Devaney, deceased*; *M'Garry* v. *Kilcullen* - - - - - - M. R. 327

COURT LETTING—Dismissal of petition as to portion of estate—Practice, Land Judge
See Dismissal of Petition. [49

DEBTS—Lunatic—Statute of Limitations 480
See Limitations, Statute of. 3.

DECREE FOR SALE — Church buildings—Trusts - - - - - - - 451
See Church Property.

DEED—Executed in blank—Fraudulent misuse of - - - - - - - - 339
See Fraud.

DENTIST — *Fraud — Joint stock company — Registration under Companies Acts—Dentists Act,* 1878 (41 & 42 *Vict.* c. 33)—*Information—Public interest—Fraudulent evasion of statute—Injunction —Jurisdiction—Costs.*] Certain persons formed a company, under the Companies Acts, with the title of "Mr. Appleton, Surgeon-Dentist, Limited," for the following objects (*inter alia*), viz.—to carry on, through competent persons, the business of dentists, or dental surgeons, in the United Kingdom, and, for that purpose, to employ suitable persons, and to purchase, hire, or procure suitable instruments, furniture, and fittings; and they carried on and advertised such business. None of the directors or other persons forming the company was a qualified dentist, registered under the Dentists Act. In an information by the Attorney-General, at the relation of the honorary secretary, Irish Branch of the British Dental Association, alleging that the company was formed for the fraudulent purpose of deceiving the public, by falsely representing that the business was

DENTIST—*continued.*
carried on by persons registered under the Dentists Act, 1878, and for the purpose of injuring and defrauding persons duly registered under that Act, the company, the signatories to the memorandum of association, and certain directors named as special defendants, not delivering any defence, it being, however, admitted that the company was in liquidation: *Held*, that, the Attorney-General, suing in the public interest to prevent an admitted fraudulent attempt to evade statutory provisions, was entitled to an injunction, and that the costs of the proceedings should be paid by the special defendants. *The Atty.-Gen.* (*O'Duffy*) v. *Appleton*
[M. R. 252

2. —— *Joint Stock Company—Registration under Companies Acts—Use of word "dentist"—Dentists Act,* 1878 (41 & 42 *Vict. c.* 33)—*Fraud—Injunction.*] Although the word "person" in section 3 of the Dentists Act, 1878, has been held not to include artificial person, and not to apply to limited companies, a limited company is not at liberty to use the word "dentist" or its synonyms in such a way as to amount to a false representation, calculated to induce the public to believe that the individuals whom it comprises or employs are qualified "dentists," and may be restrained from doing so by injunction at the suit of the Attorney-General. *Attorney-General* (*O'Duffy*) v. *Myddletons, Limited* - - - Barton, J., 471

DEPOSITED PLANS — Incorporation — Local Act—Construction - - - 152
See Plans.

DISMISSAL OF PETITION — *Practice — Land Judge's Court—Court letting of whole estate—Dismissal as to portion.*] Where a Court letting had, with the acquiescence of all parties, been made to a tenant for seven years, pending the matter, from 28th March, 1905, of the whole estate, which consisted of two portions in separate ownership, the Court, in 1907, refused, *in invitum* the Court tenant, to allow the petition to be dismissed as regards one of the portions. *In re Stinson's Estate*; *M'Munn, Petitioner* - - - Ross, J., 49

ECCLESIASTICAL LEASE—*Immediate and sub-perpetuity grant—Reddendum—Right of sub-grantee to vary rent—Church Temporalities Acts* (3 & 4 *Wm.* 4, c. 37; 6 & 7 *Wm.* 4, c. 99.] In 1848 the plaintiff's predecessor in title, an ecclesiastical lessee with customary right of renewal, who had obtained a grant in perpetuity under the Church Temporalities Acts, and who was tenant for life under a settlement, joined with his trustees in making a sub-grant in perpetuity under the same Acts to the defendant's predecessor in title in respect of a sub-lease dated 1788, which contained a *toties quoties* covenant for renewal on payment of a renewal fine of one shilling, if demanded. The sub-grant was made in consideration of the con-

ECCLESIASTICAL LEASE—*continued.*
tribution by the grantee of the proportionate part of the purchase-money paid by the grantor to his head landlord in respect of his the (grantor's) grant in perpetuity, and without any increase of the rent reserved in the sub-lease of 1788. The reddendum in the sub-grant was of the yearly rent of £ , "or such increased or diminished yearly rent or sum as shall from time to time, or at any time hereafter, be substituted in place or stead of the said reserved rent, pursuant to the provisions for that purpose contained in the said recited Act." No act was, as a matter of fact, by regnal years, recited in the sub-grant: *Held*, by the Court of Appeal (reversing the decision of Ross, J.), that the defendant's rent was not variable. *Poirez* v. *Collum* . . . . Ross, J., 5; APP. 7

EDUCATION — *Bequest for — Will — Construction.*] A testatrix bequeathed £250 to A. "for her education; should A. die under age, to be given to her sister":—*Held*, by the Court of Appeal (reversing the decision of Barton, J.), that *A.* was entitled during her minority as well to the capital as to the income of the legacy, so far as properly required for her education. *In re Black, deceased; Falls* v. *Alford* . . APP. 486

—— Legacy to be applied to maintenance and education of legatee's children 507, 510
See TRUST.

EDUCATIONAL PURPOSES—Trust for—Will - - - - - - - 9
See CHARITY. 2.

ESTATE FOR LIFE—*Or absolute interest—Will — Construction — Devise of personalty.*] A devise of personalty to *M. H. C.* "for her life, with remainder to her issue in tail male, and in default thereof to her daughters," and in default over:—*Held*, that *M. H. C.* took an interest for life only. *In re Cullen's Estate* - Ross, J., 73

—— Acceleration of interest in remainder 275, [282
See LIMITATIONS, STATUTE OF. 2.

—— Letting so long as lessee, his executors, &c., pay yearly rent - - - 488
See LEASE.

—— Tenant in tail paying off charge - 91
See MERGER. 1.

ESTATES COMMISSIONERS — Sanction to sale—Death of vendor—Conversion 204
See CONVERSION. 1.

ESTOPPEL—Unfiled agreement fixing fair rent
See TOWN-PARK. 1. [180

EVIDENCE—Accommodation land - 180
See TOWN-PARK. 1.

—— Weight of - - - - - - 481
See SEASHORE.

EXCLUSIVE CHARGE—*Land Purchase Acts—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 62 (1), (3). Section 62 (3) of the Land Act, 1903, applies only in cases where the lands sold, and the

EXCLUSIVE CHARGE—*continued.*
other lands sought to be exclusively charged, are subject to the same superior interest. Therefore, on a sale, under the Land Act, 1903, to occupying tenants, of lands which had been conveyed to the vendors, subject to certain head-rents, but indemnified therefrom by other lands, which, previous to the conveyance to the vendors, had not been subject to these head-rents, the Court refused, as against the owners of the head-rents, to make an order exclusively charging the head-rents on the indemnifying lands. *In re Boland's Estate* [Ross, J., 21

EXECUTION OF POWER—*Extent of exercise—Appointment of specified sum described as one-third portion—Deficiency of fund.*] A donee of a power of appointment in favour of younger children over a sum of £4500, raisable out of lands and over lands, which money and lands in default of appointment were to be divided equally among the objects of the power, by deed poll, executed at a date when three objects of the power were living, and on the intended marriage of *I. E. B.*, one of the objects of the power, directed and appointed as follows:—"That the sum of £1500, being one-third portion of the sum of £4500 so raisable as aforesaid, . . . shall accordingly be raised, and also interest therefor at the rate of 5 per cent. per annum; and doth hereby appoint that the said sum of £1500 and the interest thereon as aforesaid shall, immediately upon the execution of these presents, . . . belong to and be vested in the said *I. E. B.*"; and also appointed to *I. E. B.* one moiety of the lands, but did not at any time make any appointment of the residue. The lands proving insufficient to realize £4500:—*Held*, that the specific sum of £1500 and interest was appointed and payable in full out of the deficient gross sum. *Butler* v. *Blackall* - - Ross, J., 405

EXECUTOR—Breach of trust—Statute of Limitations - - - - 275, 282
See LIMITATIONS, STATUTE OF. 2.

—— Power to act as—Bank—Memorandum of association—Alteration - - 237
See COMPANY.

EXPRESS TRUST — Rentcharge—Use upon use - - - - - - 166, 176
See ANNUITY. 2.

FAIR RENT — Unfiled agreement fixing — Whether an estoppel on landlord—Town-park - - - - - - 180
See TOWN-PARK. 1.

—— User of holding—Whether town-park 363
See TOWN-PARK. 2.

FEE-FARM GRANT—Or lease for life 488
See LEASE.

—— Tenantry Act—Demand - - 258
See RENEWABLE LEASE.

FIDUCIARY RELATION—Tenants in common—New lease to one - - 212
See GRAFT.

FINES — *Nomine pœnæ* clause — Demand — Tenantry Act—Waiver - - 258
See RENEWABLE LEASE.

FORESHORE.
See SEASHORE.

FORFEITURE—Tenantry Act — Demand — Waiver - - - - - 258
See RENEWABLE LEASE.

FRAUD—*Mortgage executed with blanks for date, name of mortgagee, amount to be advanced, and rate of interest—Common agent—Mortgage executed with such blanks, and entrusted to agent for specific purpose, fraudulently appropriated by him to satisfy a past debt of his own.*] *D.*, who was induced by his solicitor and agent *G.* to become interested in a company which *G.* alleged was about to be floated, raised through *G.* several sums of money by mortgage on *D.*'s property for the purposes of the company. On the 13th February, 1906, *D.* signed a document at the solicitation of *G.* without reading it or even knowing its nature. It was, in fact, a mortgage by him of certain lands of which he was owner, blanks being left for the date, name of mortgagee, amount of advance, and rate of interest. *M.*, another client of *G.*, had placed, three years previously, £900 in his hands for investment, which *G.* appropriated to his own use, paying interest to *M.*, and representing that it was invested on mortgage. In March, 1906, *G.* filled up the blanks in the mortgage, inserting 1st December, 1905, as its date, *M.* as mortgagee, £900 as the amount advanced, and £7 per cent. as the rate of interest. No money whatever was paid to *D.* on foot of this instrument, and it did not appear in a schedule of indebtedness furnished afterwards by *G.* to *D.* *M.*, having become alarmed about *G.*'s position, repeatedly pressed for payment of the £900; and, under threat of criminal proceedings, *G.* handed over the mortgage on the 17th July. He immediately afterwards absconded, and was adjudicated bankrupt. The Court of Appeal, being of opinion that no money of *M.* was obtained on the faith of this instrument; that the only consideration for its delivery was the debt due by *G.* to *M.*; that *M.* had notice that the recital of payment on the 1st December, 1905, was false; and *G.*, in giving it, was violating his duty to *D.*:—*Held*, that the instrument gave no rights to *M.* against *D.* or his estate. *M'Cormick* v. *Duke*
[APP. 339

—— Dental company—Evasion of statute
See DENTIST. 1, 2. [252, 471
—— Legal and equitable mortgages - 57
See PRIORITY. 1.

GAME—Reservation of shooting rights—Landlord and tenant—Agreement not under seal - - - - - - 101
See SHOOTING.

GRAFT—*Expired lease—Tenants in common—Fiduciary relation—License and goodwill—New lease.*] When a lease held by tenants in common has expired, and the lessees' interest is determined, and no tenancy or interest continues or has sprung up in the former co-owners of the lease, there is no necessary incapacity which debars one of such tenants in common from obtaining a new lease to himself personally, if he does not abuse or take an inequitable advantage of his position, and if the lessor has power to give, and intends to give, it to him to the exclusion of the other former co-owners. But such a tenant in common cannot claim to hold a new lease for his own benefit if it is established—(1) that a fiduciary relation had been created, by agreement or conduct, between the tenants in common with reference to the old lease, or to an essential part of the subject-matter of the lease; or (2) that the lessee had obtained the new lease after representing to the lessor, and causing him to believe and intend, that the new lease was to be for the benefit of all the co-owners; or (3) that the new lease was obtained by the use of a right or rights which a Court of Equity would recognize as having been attached to the common property, *e.g.* a license and goodwill attached to licensed premises. *Hunter* v. *Allen*
[BARTON, J., 212

GUARANTEE—Trustees of church property—Lien—Sale - - - - - 451
See CHURCH PROPERTY.

GUARDIAN—Infant — Possession of land — Statute of Limitations - - 393
See INFANT. 1.
—— Infant—Property out of the jurisdiction 234
See INFANT. 2.

HOLDING—Re-sale to owner—Restrictions on incumbrances and sub-division - 444
See RE-SALE TO OWNER.
—— User—Whether town-park - - 363
See TOWN-PARK. 2.

INCORPORATION — Plans — Local statute — Construction - - - - 152
See PLANS.

INCUMBRANCE — Arrears of interest—Temporary insolvency as to income - 226
See BONUS. 4.
—— Ascertainment of burdens—Local registration of title - - - - - 447
See LOCAL REGISTRATION OF TITLE. 2.
—— Created after absolute order for sale . 15
See LIMITATIONS, STATUTE OF. 1.
—— Merger — Tenant in tail — Expression of intention - - - - - 91
See MERGER. 1.

INCUMBRANCE—*continued.*
—— Owner of insolvent estate entitled to 1, 139
See BONUS. 5.
—— Restriction on—3 Edw. 7, c. 37, s. 54 444
See RE-SALE TO OWNER.

INDEMNITY—Jointure—Land sold subject to —Indemnifying lands unsold—Priority
See JOINTURE. [380, 388
—— Rent — Apportionment and redemption — 59 & 60 Vict. c. 47, s. 33 (4) 190, 311
See REDEMPTION.

INFANT — *Bailiff for—Possession—Guardian—Marriage — Change of possession — Evidence of — Statute of Limitations — Vendor and purchaser.*] *P. C.*, the owner of a farm held under a yearly tenancy, died intestate in 1864, leaving a widow and four children, minors, in possession. In 1866 the widow married *T. M.*, who was accepted as tenant of the farm by the landlord. No administration was ever taken out to *P. C.* All the children of *P. C.* left the farm prior to 1883; none of them ever returned, or asserted a claim to a share in *P. C.*'s assets, and no acknowledgment of title was ever made to any of them from the time they left. *T. M.* died in 1901, having bequeathed the farm to his widow for life, and after her death to his son, the vendor. In 1902 the widow assigned the farm to the vendor freed from her life estate, and in 1907 the vendor entered into a contract for sale of the farm to the purchaser, who required the interests of the children of *P. C.* to be accounted for. This the vendor refused to do:—*Held*, on the hearing of a vendor and purchaser's summons, that although the widow of *P. C.*, and subsequently *T. M.*, entered into possession of the farm, as to two-thirds thereof, as bailiffs for the minor children, their position as such was changed by the departure of the children without making any claims to their shares; that the Statute of Limitations began to run against each child who left the farm on his or her attaining twenty-one years of age; and that, on proof that no claim had ever been made by, or acknowledgment given to, any of the children, a good title would be shown. *In re Maguire and M'Clelland's Contract* - - - APP. 393

8. —— *Guardian—Jurisdiction—British subject resident in Ireland—Property in France—Application on summons—Ord. LV., R.* 3 (9).] The Court has jurisdiction, on summons, to appoint a guardian of the estate of an infant, a British subject resident in Ireland, but having no property except personal estate in a foreign country. *In re Pavitt* [M.R. 234

INFORMATION—Fraud on public interest 252
See DENTIST. 1.

INJUNCTION—Conspiracy to injure plaintiff
See CONSPIRACY. [233

INJUNCTION—*continued.*
—— Dental Company — Fraudulent evasion of statute - - - - 252, 471
See DENTIST. 1, 2.
—— Local Act—Deviation from deposited plans
See PLANS. [152
—— Provisional Order — Sanitary Authority — Compulsory purchase of water rights
See COMPULSORY PURCHASE. [494, 503

INJURY—Conspiracy - - - 233
See CONSPIRACY.

INSOLVENT ESTATE—Arrears of interest—Temporary insolvency as to income 226
See BONUS. 4.
—— Owner also incumbrancer - - 1, 139
See BONUS. 5.
—— Payment of charge by tenant in tail—Merger —Expression of intention - - 91
See MERGER. 1.
—— Sale—Portion sold solvent as to income 148
See BONUS. 3.

INSTRUCTIONS — Costs — Taxation [85, 88, 422, 434
See TAXATION OF COSTS. 1, 2.

INTENTION—Merger of charge - - 91
See MERGER. 1.

INTEREST ON MONEY — *Will — Married woman—Exercise of general power of appointment over reversionary fund — Legacy — Time fixed for payment of—Interest, from what time payable.*] A married woman, in exercise of a general power of appointment, given by her marriage settlement over a trust fund, subject to the life interest of her husband, appointed that after his death the trust fund should be held by the trustees upon trust to pay a number of legacies to various persons, some absolutely, and some for life with remainders over, and appointed her husband residuary legatee. Her husband survived her. Upon his death the trust fund was transferred by the trustees of the settlement to her executor, who proceeded to pay the legacies. The executor of the husband, who was also executor of the wife, claimed that interest was not payable upon the legacies until the expiration of one year from the death of the husband:—*Held*, (1) that a time was fixed by the will for payment of the legacies, namely, at the date of the death of the tenant for life, and that, therefore, interest ran from that date; (2) that even if no time was fixed by the will for payment of the legacies, the fund out of which they were payable being a reversionary one, the period of grace given to the executor for payment of legacies was extended from one year after the death of the testatrix to the date at which the reversionary fund fell into possession, and that interest began to run from the date of the death of the tenant for life. *In re Gyles, deceased*; *Gibbon* v. *Chaytor* - - - - - M.R. 65

ISSUE—Gift of personal estate—Words which would confer an estate tail in realty
See ESTATE FOR LIFE. [73

JOINTURE—*Landed Judge's Court—Sale of part of land comprised in absolute order—Conveyance—Lands sold subject to a jointure—Indemnified against jointure by unsold lands—Incumbrances prior to jointure—Rights of jointress.*] In 1879 and 1880 an estate was put up for sale in fifty-one lots, and twenty-nine lots were sold, and the proceeds of the sale applied, *pro tanto*, to pay off the incumbrances. Among the charges affecting the lands was a jointure of £300 a year, created by indenture dated 16th August, 1876. The conveyances were executed to the purchasers, subject to the jointure, but indemnified against the jointure by lots 47 to 51, which were still unsold. In 1906 it was agreed to sell the rest of the lands remaining unsold to the tenants under the Land Purchase Acts. The jointure having fallen into arrear, the jointress, in February, 1907, brought an action in the Chancery Division against the purchasers of the lands sold in 1880, to raise the amount of her jointure. The purchasers applied to the Land Judge for an order that the receiver should pay the rents of lots 47 to 51 to the jointress on account of the arrears of her jointure in indemnification of the purchasers. This was opposed by mortgagees, whose incumbrances were prior in date to the jointure:—*Held*, by Ross, J., that the purchasers, by their conveyances, obtained a charge by way of indemnity on lots 47 to 51 superior to, and in priority of, the incumbrances. *Held*, by the Court of Appeal (varying the decision of Ross, J.), that the jointress could not recover for her own use out of any part of the estate any money on foot of her jointure until the incumbrances on the schedule of incumbrances prior to the jointure had been paid. *In re Rowe's Estate* - Ross, J., 380; APP. 388

JUDGMENT—Registration as mortgage—Local registration of title—Transfer of judgment debtor's estate - - - 330, 334
See LOCAL REGISTRATION OF TITLE. 1.

JURISDICTION—Chancery Division—Guardian of infant—Appointment of—Summons
See INFANT. 2. [234

—— Chancery Division—Sale of church property
See CHURCH PROPERTY. [451

—— Chancery Division—Winding up—Unregistered company - - - - 98
See WINDING UP.

—— County Court—Transfer to—Value of personalty - - - - - - 327
See COUNTY COURT. 2.

—— Injunction—Fraudulent company—Evasion of statute - - - - 252, 471
See DENTIST. 1, 2.

JURISDICTION—*continued.*

—— Land Judge—Sale—Lots—Refusal of Land Commission's offer—Land Act, 1903, s. 7 - - - - - - 351, 354
See LAND LAW (IRELAND) ACTS. 2.

LAND LAW (IRELAND) ACTS—*Agreement as to price—Arrears of rent—Bonus—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *ss.* 48, 24, *sub-s.* 8.] In a sale by a landlord of an estate under the Irish Land Act, 1903, to the tenants, arrears of rent may be included in estimating the purchase-price of the holdings, and the bonus is payable on the full amount of the purchase-money, notwithstanding that arrears of rent due by the tenants have been taken into consideration in arriving at that price. *Crosbie, Vendor*; *Neilan, Tenant*; *Same, Vendor*; *Crean, Tenant* - MEREDITH, J., 116; APP. 124

2. —— *Offer by Land Commission to purchase—Refusal by Land Judge—Subsequent proceedings to sell by auction—Irish Land Act*, 1903, *section* 7—*Lots—Practice.*] When an order has been made by the Land Judge, refusing an offer of the Estates Commissioners, made pursuant to sect. 7 of the Irish Land Act, 1903, for the purchase of the estate for sale in the matter, and the Land Judge proceeds to put up the estate for sale by public auction, in accordance with the provisions of the said section:—*Held*, by the Court of Appeal, reversing the order of Ross, J., that, in order to satisfy the test contemplated by the section, the subject-matter of the sale by public auction must be the same as that comprised in the offer made to the Land Judge, and that the lands cannot, accordingly, be put up for sale in lots. *In re Madden's Estate* - - - Ross, J., 351; APP. 354

—— Agreement for sale—Prescribed form—Absence of time limit - - 204
See CONVERSION. 1.

—— Bonus—After-acquired property—Covenant to settle—Settlement - - 51
See BONUS. 1.

—— Bonus—Assignment of life estate - 483
See BONUS. 2.

—— Bonus—Estate solvent as to income—Board of Works charge - - - 148
See BONUS. 3.

—— Bonus—Insolvent estate—Owner also incumbrancer - - - - - 1, 139
See BONUS. 5.

—— Bonus—Settled Land Acts—Person deemed to be tenant for life—Leave to sell - 305
See SETTLED LAND ACTS. 2.

—— Bonus—Temporary insolvency as to income—Land Act, 1903, s. 48 (1) - - 226
See BONUS. 4.

—— Estates Commissioners—Sale sanctioned by—Conversion - - - - 204
See CONVERSION. 1.

LAND LAW (IRELAND) ACTS—*continued.*
—— Exclusive charge—3 Edw. 7, c. 37, s. 62 (1), (3) - - - - - - 21
See EXCLUSIVE CHARGE.
—— Non-agricultural holding — Buildings and shop in village - - - - 41
See NON-AGRICULTURAL HOLDING.
—— Redemption—Indemnifying lands—Priority —59 & 60 Vict. c. 47, s. 33 (4) 190, 311
See REDEMPTION.
—— Rentcharge—Option to purchase unlimited as to time—Redemption - 194, 292
See PERPETUITY.
—— Re-sale to owner — Restriction on incumbrances - - - - - - 444
See RE-SALE TO OWNER.
—— Sale to Congested Districts Board—Negotiation fee - - - - - - 361
See NEGOTIATION FEE.
—— Town-park — Accommodation land—Unfiled agreement fixing fair rent - - 180
See TOWN-PARK. 1.
—— Town-park—User—Land Law (Ireland) Acts, 1887, s. 9; 1896, s. 6 - - 363
See TOWN-PARK. 2.
LANDLORD AND TENANT — Contract of tenancy not under seal—Reservation of shooting right—Profit *à prendre.* 101
See SHOOTING.
—— Court letting—Dismissal of petition for sale —Practice, Land Judge - - 49
See DISMISSAL OF PETITION.
—— Land Law (Ireland) Acts.
See LAND LAW (IRELAND) ACTS.
—— Lease.
See LEASE.
—— Redemption — Apportioned part of rent — Indemnifying lands—Priority 190, 311
See REDEMPTION.
LEASE — *Landlord and tenant—Agreement for tenancy—Letting of freehold premises "so long as lessee, his executors, &c., shall pay the yearly rent" —Lease for life or in perpetuity.*] *C.*, owner in fee of certain premises, and *H.*, a yearly tenant under *C.*, of the premises, entered into an agreement in writing, whereby, after reciting the existing yearly tenancy, and that *C.*, "for herself and her heirs, executors, administrators, and assigns," had agreed with *H.*, "his executors, administrators, and assigns," to allow him to hold and occupy the undisturbed possession of the premises in consideration of the due payment by *H.* of the yearly rent of £50, it was witnessed that *C.* agreed to let, and *H.* to take, the premises at the yearly rent of £50. The agreement contained covenants whereby *H.*, "for himself, his executors, administrators, and assigns," agreed to keep the premises in repair, and to carry out alterations on the approval of *C.*, and a covenant by *C.*, whereby *C.*, "for herself, her
LEASE—*continued.*
heirs, executors, administrators, and assigns," agreed with *H.* that, so long as *H.*, "his executors, administrators and assigns," continued to pay the yearly rent, *C.* would continue *H.*, "his executors, administrators, and assigns," as the tenant of the premises, and preserve to him and them the quiet and peaceable enjoyment of same; and a further covenant by *H.*, that *H.*, "his heirs, executors, or administrators," should not set, sell, or assign his interest in the premises without the consent in writing of *C.*, "her heirs, executors, administrators, or assigns, or her or their agent at the time being":—*Held*, that the agreement created a tenancy for the lessee's life. *In re Coleman's Estate; Henry, Petitioner* - Ross J., 488
—— Ecclesiastical—Sub-perpetuity grant—Variation of rent - - - - - 5, 7
See ECCLESIASTICAL LEASE.
—— Graft - - - - - - - - 212
See GRAFT.
—— Presbyterian Church — Guarantee — Lien—Sale - - - - - - 451
See CHURCH PROPERTY.
—— Renewable—Tenantry Act—Demand 258
See RENEWABLE LEASE.
—— Turbary — Paring scraw turf — Deep bog turf—Mountain - - 411, 421
See TURF.
LEAVE TO SELL — Settled Land Act, 1884, s. 7 (ii)—Costs - - - - 305
See SETTLED LAND ACTS. 2.
LEGACY—Breach of trust—Accruer of right—Statute of Limitations - 275, 282
See LIMITATIONS STATUTE OF. 2.
—— Charitable—Support and education - 9
See CHARITY. 2.
—— For education — Gift over on the death of legatee under 21—Whether capital may be resorted to - - - - 486
See EDUCATION.
—— In words which would confer an estate tail in realty—Whether absolute gift, or for life - - - - - - - 73
See ESTATE FOR LIFE.
—— Payable out of reversionary fund—Interest —From what time payable - 65
See INTEREST ON MONEY.
—— Whether for benefit of legatee or in trust
See TRUST. [507, 510
LEGAL ESTATE—Mortgage—Title-deeds 57
See PRIORITY. 1.
LICENSE—Hotel—New lease—Graft - 212
See GRAFT.
LIEN—Church buildings—Decree for sale 451
See CHURCH PROPERTY.
LIFE ESTATE.
See ESTATE FOR LIFE.

LIMITATIONS, STATUTE OF—*Absolute order for sale—Landed Estates Court—Incumbrances created by owner after order for sale.*] Where, subsequent to the date of an absolute order for sale, made on an incumbrancer's petition, the owner creates a valid incumbrance on the lands ordered to be sold, such incumbrance is protected by the absolute order for sale against the operation of the Statute of Limitations. *In re Colclough's Estate* (8 Ir. Ch. R. 330) and *In re Nixon's Estate* (Ir. R. 9 Eq. 7) considered. *In re Swanton's Estate* ([1898] 1 Ir. R. 157) followed. *In re Morrison's Estate*; *Kennedy, Petitioner* - - Ross, J., 15

2. —— *Breach of trust — Legacy — Statute of Limitations—Real Property Limitation Act*, 1874, *s.* 8—*Accruer of right—Life interest—Payment of capitalized sum to life tenant—Acceleration of interest in remainder.*] *W. L.*, who was possessed of, amongst other property, certain shares in the Munster Bank, then a flourishing institution, died in 1867, leaving a widow and three children, including the plaintiff. By his will he bequeathed to his three children, who were then minors, all his real and personal property in equal shares, and directed that his wife should get, for her support, one fourth part of the rents of houses, of dividends of the said Munster Bank shares, and of the Kinsale Gas Company, Limited, and of the interest of any money he might be possessed of. *J. H.*, the sole executor, proved the will, and died in 1873, and the administration of the estate was undertaken by one of his executors, *T. C.* In 1870 and 1873, respectively, *J. H.* and *T. C.*, in breach of trust, but in good faith, applied portion of the testator's assets in the purchase of further shares in the Munster Bank, which subsequently failed, and *T. C.* was compelled to pay a call of £190 in respect of the purchased shares, the value of which was lost. In 1885 an arrangement was entered into between the widow and the three children, with a view to dividing the then subsisting assets between them, and transfers of the bank shares were prepared and signed, but not registered, the arrangement being postponed owing to a direction in testator's will, that the rights of *J. A. L.*, one of the children, should not accrue in possession until he attained the age of twenty-five, which occurred in 1890. In 1890 it was arranged between the widow and the three children that the estate should be wound up. The widow's life interest in the testator's assets was valued at £50, which was paid to her as a capital sum, and the balance of the assets was distributed between the three children, each of whom gave a receipt therefor, and released the executor from all claims in connexion with the estate. None of the children had then, as they alleged, any knowledge of the unauthorized investments in the Munster Bank shares. The widow died in 1904, and *T. C.* in 1905. The present action was instituted in 1905, to administer the real and personal estate of *W. L.*, and sought to charge the defendants, as executors of *T. C.* (who admitted assets), with the price of the shares which had been purchased in breach of trust, and the amount of the calls thereon:—*Held*, by the Court of Appeal, reversing the judgment of the Master of the Rolls, that, on the true construction of the arrangement entered into in 1890, the widow's life interest was determined, and the title of the plaintiff and of the remaining children to the entire assets accelerated; that there was from that date a present right of action in respect of the entire assets, including the one-fourth part thereof bequeathed to the testator's widow for her life, and therefore the action was barred by the Statute of Limitations. *Russell* v. *Crowley*

[M. R., 275; App. 282

3. —— *Lunatic—Debts—Statute of Limitations—Lunacy Act*, 1871 (34 *Vict. c.* 22), *s.* 95 (1).] The Court will not pay debts contracted by a lunatic before he became of unsound mind, when such debts are barred by the Statute of Limitations. *In re Kenrick* - - - - L. C., 480

—— Express trust—Annuity—Use upon use
See ANNUITY. 2. [166, 176

—— Infant—Bailiff—Change of possession 393
See INFANT. 1.

—— Part payment out of Court - - 357
See PART PAYMENT.

LIS PENDENS—Absolute order for sale—Suspension of mortgagee's right of sale 76
See MORTGAGE.

—— Costs of registration - - 422, 434
See TAXATION OF COSTS. 1.

LOCAL GOVERNMENT—Provisional Order—Compulsory purchase of water rights—Sanitary Authority—Injunction
See COMPULSORY PURCHASE. [494, 503

LOCAL REGISTRATION OF TITLE — *Registered owner—Transfer of interest in lands—Registration of judgment mortgage — Subsequent registration of transfer—Priority—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 Vict. *c.* 66), *ss.* 25, 35.] Section 25 of the Local Registration of Title (Ireland) Act, 1891, applies only to conveyances prior to the first registration, and does not apply to transfers of registered land, which are governed by section 35. Under the latter section a transferee acquires no title until he is registered as owner, and his title does not relate back, but is subject to burdens registered prior to the registration of his title. A registered owner of lands entitled to a beneficial interest therein transferred the lands to the defendant, who delayed to register his title. In the meantime the plaintiffs, having recovered judgment against the registered

LOCAL REGISTRATION OF TITLE—*continued.*

owner, registered their judgment in the Local Registration of Title Office a few hours before the defendant was registered as owner:—*Held*, by the Court of Appeal (affirming the decision of Barton, J., that the first registered owner of the lands had not effectually parted with the beneficial interest in the lands, at the date of the judgment and its registration, and that, consequently, the judgment mortgage charged and affected such interest in priority to the title of the defendant. *Pim* v. *Coyle*

[BARTON, J., 330; APP. 334

2. —— *Registration subject to rights or equities —Ascertainment of burdens.*] Where the title of a tenant-purchaser is registered under the provisions of the Local Registration of Title Act, 1891, "subject to equities," and where, on the application of the registered owner, the Registering Authority, under sect. 29 (4) of the Act, ascertains and enters on the register burdens created by such a tenant-purchaser prior to the acquisition by him of the fee-simple, those burdens affect the fee-simple; and the powers of the owners of those burdens, including the power of sale of a mortgagee, will operate on the fee-simple. *In re Purvis* - - - - MADDEN, J., 447

LOTS—Sale by Land Judge—Refusal of offer by Land Commission to purchase—Land Act, 1903, s. 7 - - - - 351, 354
See LAND LAW (IRELAND) ACTS. 2.

LUNATIC—Debts—Statute of Limitations 480
See LIMITATIONS, STATUTE OF. 3.

MAINTENANCE — Of legatee's children — Legacy to be applied in - 507, 510
See TRUST.

MARRIAGE SETTLEMENT.
See SETTLEMENT.

MEMORANDUM OF ASSOCIATION — Alteration—Banking Company—Extension of business - - - 237
See COMPANY.

MERGER—*Tenant in tail in possession paying off charges — Expression of intention — Benefit of remainderman — Insolvent estate.*] By his will, dated the 17th February, 1858, *W. J. W.* devised the lands for sale to his son Thomas in tail, with remainder to Alfred in tail, with remainder to William in tail, with remainder to John in tail; and he charged the lands with ten sums of money in favour of his younger children. The testator died in 1859, and on his death Thomas entered into possession, and died without issue in 1877, and Alfred, having predeceased Thomas, and having left no issue, William succeeded, and died in 1902 without issue, and without having disentailed. During his lifetime William bought the legacy of £500 bequeathed to his brother Henry by the will of his father, and got it assigned to him by

MERGER—*continued.*

deed in 1884. In 1889 he paid off the legacy of £1000 bequeathed to one of his sisters, Mrs. *P.*, without getting any assignment. By his will, dated in 1900, William *W.* left legacies of £1000 each to his two sisters, Mrs. *M.* and Mrs. *C.*, provided that they should, within one month, give notice in writing to the executors that they accepted the legacies in satisfaction and discharge of all claims upon the lands, and he directed that these notices should be handed over to John, the next tenant in tail in remainder. He bequeathed to John his own legacy of £500, and also the legacy purchased by him from Henry, and appointed John his residuary legatee. The lands were sold in the Land Judge's Court, and the estate was insolvent. On the final schedule of incumbrancers the executors of William were returned as incumbrancers in respect of the three legacies of £1000 left to the testator's three sisters, which he had paid off. On an objection filed by the assignee of another legatee, whose legacy was charged on the lands:—*Held* (reversing the decision of Ross, J.), that the three charges were merged, and the executors were not entitled to be placed on the schedule of incumbrancers. *In re Wallace's Estate*; *Caulfield, Petitioner* - - - - - APP. 91

2. —— *Testator entitled as equitable tenant for life, with contingent remainder in fee, to lands subject to a charge which, subsequently to date of will, became vested in him—Codicil—Intention—Direction to sell—Devise of "principal sum to be realized by the sale."*] Under a settlement, made in 1871, *J. P.* was entitled, as equitable tenant for life, to certain lands, with remainder in fee in the event of his dying without issue, subject to the interposed life estate in his wife. At the time of the settlement the lands, which were held under a Church lease, which, in 1873, was converted into a grant in fee, were subject to a charge vested in *A. I.* In 1878 *J. P.* made his will, wherein, after reciting that, by his marriage settlement, he had given his wife a life estate in the lands, he proceeded as follows:—"But if it please Providence that I leave no child, then, from and after the decease of my said wife, I will, bequeath, and direct that the said lands . . . shall be sold . . . , and I hereby leave and bequeath the principal sum to be realized by the sale of said property to . . . the . . . bishops of the diocese of *O.* . . . and to their respective successors, . . . in trust to and for the following uses," &c. *A. I.* died in 1879, having by her will bequeathed the charge on the the said lands to *J. P.*, who, as her sole executor, obtained probate. Subsequently *J. P.* executed three codicils to his will, by each of which he disposed solely of sums of Government Stock, leaving them to his wife for life, and after her death to the bishops, on the trusts declared in his will. *J. P.*

MERGER—*continued.*
died in 1884. On a question subsequently arising as to whether the charge was still a valid and subsisting charge:—*Held*, (1) that, on the evidence, the inference to be drawn was that the testator intended the charge to merge; and (2) that, apart from this question, the words in the will, "principal sum realized by the sale," were sufficient to pass the entire net proceeds of sale, including the charge. *In re Butlin's Estate* - WYLIE, J., 159

MORTGAGE — *Land Judge's Court — Absolute order for sale*—Lis pendens—*Sale by incumbrancer after order for sale—Suspension of mortgagee's right of sale.*] The absolute order for sale in the Land Judge's Court, so long as it is in full force and not stayed, operates to suspend all other powers of sale. Therefore, where a second incumbrancer, in exercise of his statutory or express power of sale, after the date of the absolute order, which had been registered as *lis pendens*, sold the lands freed and discharged from the owner's equity of redemption, the Court, at the instance of puisne incumbrancers, who would be shut out by the sale, declined to recognize the sale, and refused an application to insert the purchaser's name as owner. *In re Beauclerk's Estate*; *Scottish Widows' Fund Life Assurance Society, Petitioners* Ross, J., 76

—— Blanks in—Filled up fraudulently - 339
See FRAUD.

—— Equitable interest in personalty—Notice before grant of administration—Priority
See PRIORITY. 2. [321

—— Judgment—Transfer of estate—Local registration of title - - - 330, 334
See LOCAL REGISTRATION OF TITLE. 1.

—— Priority—Legal estate—Title deeds—Equitable mortgage - - - - 57
See PRIORITY. 1.

—— Statute of Limitations—Part payment—Payment out of Court - - - 357
See PART PAYMENT.

NEGLIGENCE—Title deeds—Priority 57
See PRIORITY. 1.

NEGOTIATION FEE—*Land Purchase Acts—Practice — Irish Land Act*, 1903, *sects.* 23 (12) *and* 79 — *Sale to the Congested Districts Board.*] A negotiation fee is not payable out of the purchase-money of an estate sold to the Congested Districts Board under the provisions of the Irish Land Act, 1903. *In re Armstrong's Estate* WYLIE, J., 361

NON-AGRICULTURAL HOLDING—*Landlord and tenant—Land Acts*, 1881, 1887, 1896—*Buildings and shop in a village—No separation of holding.*] A holding, comprising 20A. 1R. 35P., held at a rent of £22 a-year, was situate near the village of Gortin, in the county of Tyrone. The house on the holding—originally a thatched cottage—was in the main street of the village. The holding was sold in 1870 for £250 to *J. M.*, who built a substantial house in place of the cottage, in which he carried on the business of a general shop, and to which at one time a license was attached. After the death of *J. M.*, in 1881, the holding was sold for £425, and the present tenant built a second house on it in 1890, which was let at £8 a year, and was used for the post office and as a saddlery shop. The Poor Law valuation of the holding was £36, of which £13 5*s.* was the valuation of the land, and £22 10*s.* of the buildings. The land was worked as an ordinary farm:—*Held*, that the holding was not substantially agricultural or pastoral in its character. *M'Farland, Tenant*; *Hamilton and Royds, Landlords* - APP. 41

ORDERS, GENERAL—1905 (22nd February) V., R. 2 - - - - - 202
See ADMINISTRATION ACTION. 2.

—— —— XLIX., Rr. 3, 9 - - - 202
See ADMINISTRATION ACTION. 2.

—— —— LV., R. 3 (9) - - - - 234
See INFANT. 2.

PART PAYMENT—*Statute of Limitations—Mortgage—Payment by Landed Estates Court.*] *T. S. I.*, owner as tenant for life of lands, filed a petition in the Landed Estates Court for the sale of the lands, excluding the mines and minerals. His costs in the petition matter amounted to £197 12*s.* On the 15th August, 1884, he mortgaged the lands, including the mines and minerals, to his solicitors, to secure the sum of £300, including the said sum of £197 12*s.*, which was expressly mentioned in the schedule to the mortgage. Subsequently *A. S. I.*, the owner's brother, filed a petition as incumbrancer for the sale of the same lands, and, the two matters having been consolidated, *A. S. I.* obtained carriage, and the lands were sold. The mortgage for £300 did not appear on the schedule of incumbrances, as the purchase-moneys were insufficient to reach it. By consent of the prior incumbrancers, and no person objecting, the sum of £197 12*s.*, being the costs of the first petition, was, in accordance with the practice of the Court, placed in priority to the incumbrances, and paid on allocation on the 20th August, 1897. In 1901 *A. S. I.* filed a petition for the sale of the mines of coal and clay under the same lands. On the settlement of the schedule of incumbrances:—*Held*, that the payment of 20th August, 1897, was a payment by the mortgagor of part of the principal money of the mortgage within the meaning of sect. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), so as to keep the mortgage debt alive. *In re Irwin's Estate*; *Irwin, Petitioner* Ross, J., 357

PATENT FROM THE CROWN — User—Weight of evidence - - - 481
See SEASHORE.

PAYMENT—Out of Court on account of demand—Statute of Limitations - 357
See PART PAYMENT.

PERPETUITY — *Settlement — Construction — Gift of rentcharge to a charity—Option to assign bonds to redeem rentcharge—No limit as to time.*] By indenture, dated the 31st December, 1888, *J. R. J.* conveyed to *H. C. J.* certain freehold lands in fee, on trust to pay to *J. R. J.* £200 a year for life, and then to pay £90 per annum out of the rents of the said lands for the support of the Protestant religion, in accordance with the Thirty-nine Articles of the Church of England, within the parish of Castlejordan in the diocese of Meath, "Provided that the person or persons for the time being beneficially interested in the said estates, as the representative or representatives of the said *J. R. J.*, shall, if he or they shall so think fit, in lieu of the said £90, pay the interest payable on eighteen Russian imperial or railway bonds for £100 each to and for the aforesaid purpose," and to pay the residue of the rents of the lands in equal shares to his three daughters, Martha *T.*, Mary *W.*, and Anna *M. J.*, respectively, during their joint lives; and on the death of the said Martha *T.*, her share of the residue of the rents to be paid to the heir-at-law of the said *J. R. J.*, such heir to be ascertained from among his descendants, according to the same rules as are now applicable to the descent of the Crown of England among the descendants of King George I.; on the death of either of the other two daughters her share to be paid to the survivor, and on the death of the survivor, the entire share so payable to her to be paid to the heir of *J. R. J.*, such heir to be ascertained as before directed. *J. R. J.* died in 1892, and the lands having been sold to the tenants under the Land Purchase Acts:—*Held*, by the Court of Appeal (reversing the decision of Ross, J.), that the proviso was void under the rule against perpetuities, and that the rentcharge of £90 a year could not be redeemed by assigning eighteen Russian bonds in lieu of the rentcharge. *In re Tyrrell's Estate*; *Joly, Petitioner* Ross, J. 194; APP. 292
—— Class—Support and education - - 9
See CHARITY. 2.
—— Land Purchase Acts—Agreement for sale in prescribed form—Absence of time limit *see* CONVERSION. 1. [204

PETITION — Company—Alteration of memorandum of association—Advertisement—Practice - - - - - 237
See COMPANY.

PLANS—*Housing of the Working Classes* Act, 1890—*Public Health (Ireland) Act*, 1878—*Local Act—Purposes of—Deposit of plans—Extent of incorporation—Basis of compensation—Modification of plans—Injunction*—53 & 54 *Vict. c.* 70, *Part III*—41 & 42 *Vict. c.* 52—63 & 64 *Vict. c.* cxcii (*L. &*

PLANS—*continued.*

P.)—*Compulsory purchase.*] Prior to the passing of a Provisional Orders Confirmation Act, empowering the defendants to acquire compulsorily from the plaintiffs and from others certain lands, for the purposes of Part III. of the Housing of the Working Classes Act, 1890, and for the purposes of the widening, opening, enlarging, and otherwise improving certain streets and roads within the town of Bray, plans of the lands to be taken, one of which showed a ground-plan of forty-five cottages proposed to be built, a proposed "playground," and a proposed approach 50 feet wide, were duly deposited with the Local Government Board, and in Parliament. Section 1 of the Provisional Order in question, which recited the deposit of the plans, described the lands to be compulsorily acquired as "the lands, easements, rights of way, and other premises described in the deposited plans and book of reference"; and the plans were referred to as "the plans showing the lands and premises required for the purposes aforesaid." The Act did not further or otherwise refer to the plans, and did not contain any provision requiring the defendants to carry out the works according to the plans. After the passing of the Act, the arbitrator appointed by the Local Government Board assessed the compensation to be paid to the plaintiffs for purchase-money, and for injury to adjoining lands, and the amount awarded was paid. Subsequently, modified plans for the building upon the acquired lands of a larger number of cottages, the use for that purpose of part of the space marked "playground," and the making of a 20-foot, instead of a 50-foot, approach, were prepared by defendants and approved of by the Local Government Board, through whom the defendants were borrowing money for the carrying out of the works. On an application for an injunction to restrain the carrying out of the modified plans:—*Held*, by the Court of Appeal (affirming the order of Barton, J.), that the only restriction on the use of the lands compulsorily acquired by the defendants was, that they should be used for the purpose of Part III. of the Housing of the Working Classes Act, 1890, and also for the purpose of widening, opening, enlarging, and otherwise improving the said streets and roads in the town of Bray; that whilst observing such purposes, the defendants were not bound to adhere to the deposited plans; and that the plaintiffs' claim for an injunction should be dismissed. *Bradshaw and Falconer* v. *Bray Urban District Council* [APP. 152

POWER—Execution—Appointment, whether of aliquot part or of specific sum - 405
See EXECUTION OF POWER.
—— Reversionary fund—Legacy—Interest 65
See INTEREST ON MONEY.

PRACTICE— Administration action — Costs — Defaulting personal representative — Solicitor - - - - 223, 225
See ADMINISTRATION ACTION. 1.

—— Administration action— Two summonses — Carriage of proceedings — Priority — Transfer and consolidation - 202
See ADMINISTRATION ACTION. 2.

—— Company—Memorandum of association — Alteration—Petition—Advertisements
See COMPANY. [237

—— Infant—Guardian—Appointment— Summons
See INFANT. 2. [234

—— Injunction—Dental company—Use of word "dentist" - - - 252, 471
See DENTIST. 1, 2.

—— Injunction—Deviation from plans — Incorporation—Local Act - - - 152
See PLANS.

—— Injunction — Provisional Order — Sanitary authority—Water rights - 494, 503
See COMPULSORY PURCHASE.

—— Land Commission—Sale to Congested Districts Board—Negotiation fee - - 361
See NEGOTIATION FEE.

—— Land Judge—Absolute order for sale—Suspension of mortgagee's right of sale 76
See MORTGAGE.

—— Land Judge— Court tenant — Dismissal of petition - - - - - - 49
See DISMISSAL OF PETITION.

—— Land Judge—Sale in lots—Refusal of Land Commission's offer — Land Act, 1903, s. 7 - - - - - - 351, 354
See LAND LAW (IRELAND) ACTS. 2.

—— Land Judge—Sale subject to jointure with indemnity—Indemnifying lands unsold—Incumbrances prior to jointure—Priority
See JOINTURE. [380, 388

—— Lunatic—Debts—Statute of Limitations 480
See LIMITATIONS, STATUTE OF. 3.

—— Receiver—Omission to re-register recognizance—Consequent liability - 198
See RECEIVER.

—— Settled Land Acts—Leave to sell—Costs 305
See SETTLED LAND ACTS. 2.

—— Settled Land Acts — Trustees— Compound settlement - - - - - 88
See SETTLED LAND ACTS. 1.

—— Taxation of costs—Discretion of Taxing Master—Four counsel - - 85, 88
See TAXATION OF COSTS. 2.

—— Taxation of costs—Motion for judgment — Instructions—Counsel — Registration as *lis pendens* - - - 422, 434
See TAXATION OF COSTS. 1.

PRACTICE—*continued.*

—— Transfer to County Court—Action to set aside agreement for sale—Plaintiff not party to agreement — Purchase-money under £500—Valuation over £30 - 82, 84
See COUNTY COURT. 1.

—— Transfer to County Court — Administration action—Value of personalty, when to be ascertained - - - - - 327
See COUNTY COURT. 2.

—— Winding up—Unregistered company 98
See WINDING UP.

PRECATORY TRUST — Legatee, whether taking beneficially or in trust 507, 510
See TRUST.

PRINCIPAL AND AGENT.
See AGENT.

PRIORITY—*Legal mortgage—Subsequent equitable mortgage by title-deeds—Fraud or gross negligence—Burden of proof—Registration—Non-registrable security.*] In an administration suit there appeared on the allocation schedule an item due for principal and interest to a legal mortgagee, under a registered legal mortgage, dated 1884; and after it an item due to a Banking Company, on foot of an equitable mortgage, by deposit of title-deeds made by the original mortgagor in 1901. The estate was insolvent, and there was not sufficient money in Court to pay both mortgages in full. Evidence was given by the Bank manager that the mortgagor, when depositing the deeds in 1901, represented that the estate was unencumbered. There was no evidence or circumstance pointing to any fraud or negligence on the part of the prior legal mortgagee, or connecting him with the fraud of the mortgagor; and the legal mortgage was otherwise unimpeached. Interest had been regularly paid on it since 1884. The legal mortgagee was dead, and no explanation was available as to the circumstances under which the title-deeds had been in the possession of the mortgagor at the date of the second mortgage. No application was made to the Court for an inquiry at Chambers; and it was not suggested that any relevant evidence was obtainable, or was being withheld by the successor in title of the legal mortgagee:—*Held*, that the mere fact of non-possession of the deeds by the prior legal mortgagee, and possession of them by the subsequent equitable mortgagee, where there was no evidence or circumstance pointing to fraud or negligence on the part of the prior legal mortgagee, or connecting him with the fraud of the mortgagor, was not, under the circumstances of the case, sufficient to displace the priority of the prior legal mortgagee. *Held*, further, that the registration of the prior legal mortgage did not, *per se*, affect the priorities, because the equitable mortgage was a non-registrable security. *Quære*: Whether

PRIORITY—*continued.*
the fact that the prior mortgagee had duly registered his mortgage could have any relevance upon the issues of fraud and negligence in connexion with the non-possession of title-deeds. *In re Greer, deceased*; *Greer* v. *Greer* - BARTON, J., 57

2. —— *Mortgage of equitable interest in personalty—Administrator—Notice before administration granted—Notice to trustees of original and derivative funds.*] Priorities, as between mortgagees of the distributive share of one of the next-of-kin of an intestate, rank according to the dates of the notices given to the administrator after administration has been taken out. Notice given before administration has been taken out to a possible or future administrator, even if he be also the holder of a fund out of which moneys may be payable to the future administrator, is ineffectual for the purpose of obtaining priority as against other mortgagees who give notice to the administrator after he has obtained administration. *In re Kinahan's Trusts* - BARTON, J., 321

—— Administration summons — Carriage of proceedings - - - - - - 202
See ADMINISTRATION ACTION. 2.

—— Local registration of title—Judgment mortgage—Transferee of estate - 330, 334
See LOCAL REGISTRATION OF TITLE. 1.

—— Sale subject to jointure with indemnity — Prior incumbrances—Indemnifying lands not sold - - - - - 380, 388
See JOINTURE.

PROFIT A PRENDRE—Agreement for tenancy not under seal — Reservation of shooting rights - - - - 101
See SHOOTING.

PUBLIC HEALTH ACT, 1878 — Sanitary Authority—Water supply - 494, 503
See COMPULSORY PURCHASE.

RECEIVER — *Registration of recognizances — Surety — Loss of securities—Liability of estate.*] Where two of three sureties, who had paid the amount due to the estate, the subject-matter of the petition for sale, by a defaulting receiver, were prevented from enforcing their claim for contribution against their co-surety by the neglect of the responsible person to re-register the recognizances entered into by the receiver and his sureties, whereby the benefit of the securities for the debt was lost:—*Held* (without deciding any question as to the person ultimately liable), that the estate should make good the loss. *In re Nugent's Assignees' Estate* - - - - Ross, J. 198

RECOGNIZANCE — Defaulting receiver — Neglect to re-register—Right of sureties to be recouped out of estate - 198
See RECEIVER.

REDEMPTION — *Of liability for rent out of estate indemnified therefrom — Right over against indemnifying lands — Land Law (Irelnnd) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 33 (4).] Where a rent is payable in respect of lands sold under the Land Purchase Acts, but the lands have a right of indemnity against other lands, sect. 33 (4) of the Land Law (Ireland) Act, 1896, creates, in favour of the person who has paid the redemption price, a rent on the indemnifying lands equal in amount to the portion of the rent which has been redeemed, in like manner as if such person had purchased the same:—*Held*, by the Court of Appeal (reversing the order of Ross, J.), that, for the purpose of securing the hypothetical purchaser, the rent so deemed to have been purchased must be secured as part of the original rent, and ranks therefore *pari passu* with the unredeemed portion of such original rent. *In re Thomson's Estate*; *O'Connell, petitioner* - - - Ross, J., 190; APP. 311

—— Annuity charged on land—Option to purchase at a time unlimited — Settlement—Construction - - - - 194, 292
See PERPETUITY.

REGISTRATION — Dental company — Companies Acts - - - 252, 471
See DENTIST. 1, 2.

—— Lis pendens - - - - 422, 434
See TAXATION OF COSTS. 1.

—— Title — Judgment mortgage — Transferee of estate - - - - 330, 334
See LOCAL REGISTRATION OF TITLE. 1.

RENEWABLE LEASE — *Fines* — Nomine pœnæ *clause — Demand — Waiver — Tenantry Act* (19 & 20 *Geo.* 3, *c.* 30, *Ir.*).] A "demand" within the Tenantry Act is not waived by a subsequent "demand," unless the latter is complied with within a reasonable time, and the previous delay may be taken into account in considering the effect of subsequent delay. But a lessor may waive the effect of a demand by pursuing a course of conduct inconsistent with further insistence on it, especially after he has become aware that his conduct is being acted on by the other party to his detriment. A lease for lives renewable for ever was renewed in 1840. The covenant for renewal was for renewal within twelve months after the falling of each life, upon payment of a fine. There was also a *nomine pœnæ* clause, providing for a penalty of 6*d.* a month in the event of neglect or refusal to pay fines within twelve months of the dropping of a life. The first life fell in 1863, but no fine was paid, and no renewal was taken out. There was no fraud or conduct amounting to refusal on the part of the lessees, whose agent believed that the lessees had, under the *nomine pœnæ* clause, the option of paying the fines and penal fines at any time before the end of the lease. The lessors relied upon letters, written to *T.*, agent

RENEWABLE LEASE—*continued.*
for *L.*, who was entitled to a moiety of the lessees' interest, between 1891 and 1901, as "demands" within the meaning of the Tenantry Act. It was questionable whether they were addressed by and to the proper parties as prescribed by that Act. Afterwards, in 1903, negotiations between the lessors and lessees for a fee-farm grant were re-opened. On the faith of these negotiations, and with a view to completing the grant, *L.* purchased for £800 certain undivided shares of the other parties entitled to the lessees' interest, the existence of which was an obstacle to the completion of the grant; and other expenses were incurred by *L.* at the lessors' request. The purchase of these shares was made known to the lessors, who afterwards accepted the title and approved of the fee-farm grant in September, 1904. After the fee-farm grant had been approved by the lessors in September, 1904, the fines were ascertained, and thenceforward the lessors knew that the lessees were ready and willing to pay the fines. The lessors then made a requisition, necessitating the execution of powers of attorney by persons in Belgium and Australia, which involved difficulty and delay. The lessors' agent wrote in January, 1905, reminding *T.* that the fee-farm grant had been approved in the previous September; and again, in September, 1905, he wrote, informing *T.* that he was instructed to place it on record that the last life had died, and that the lessees must now take the consequence of their neglect. This letter was based on a mistake of fact, as the last life had not died. *T.* wrote back at once, correcting the mistake, and informed the lessors' agent of the steps which were being taken to obtain the power of attorney in Australia. The lessors did not then press the matter further. The power of attorney was not available until May, 1906. The lessors then refused to execute a grant, and the lessees presented this petition:—*Held*, (1) that, assuming that the letters written prior to 1901 contained effective "demands," made by and to the proper persons, in accordance with the provisions of the Tenantry Act, their effect was waived by the lessors in 1903 and 1904; (2) that the letters of January and September, 1905, were not effective "demands" within the Tenantry Act; (3) that, in the absence of any effective "demand" within the Tenantry Act, there was not such neglect or delay on the part of the lessees as would *per se* disentitle them to renewal; but that, under the circumstances, the petitioners should pay the whole costs of the petition. *Held*, also, that the *nomine pœnæ* clause did not, if the lessor demanded the fines, give the lessee an option to put off paying them until the end of the lease, or at all events equity would not enforce the covenant in that sense; but if no "demand" were made, the *nomine pœnæ* clause might cover a case of mere neglect to pay fines. *Ex parte Lane* [Barton, J., 258

RENEWABLE LEASE—*continued.*
RENT—Arrears of, included in purchese-price—Bonus - - - - - 116, 124
See Land Law (Ireland) Acts. 1.
—— Redemption of apportioned part—Indemnifying lands—Priority - - 190, 311
See Redemption.
—— Sub-perpetuity—Variation - - 5, 7
See Ecclesiastical Lease.
RENTCHARGE.
See Annuity.
REPUBLICATION OF WILL—Codicil—Gift to charity - - - - - 315
See Charity. 1.
RE-REGISTRATION—Of receiver's recognizance—Neglect to re-register—Liability of estate to sureties - - - 198
See Receiver.
RE-SALE TO OWNER—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *section* 54—*Estate purchased by Land Commission from owner—Restrictions on incumbrances.*] Section 54 of the Irish Land Act, 1903, which contains restrictions on sub-division and incumbrance of holdings, for the purchase of which an advance has been made by the Land Commission, does not apply to lands repurchased by an owner under section 3 of the Act. *In re Freeman* - - - - - Madden, J., 444
RESERVATION—Landlord and tenant—Agreement not under seal - - - 101
See Shooting.
SALE—Church property—Lien - - 451
See Church Property.
—— Congested Districts Board—Negotiation fee
See Negotiation Fee. [361
—— Re-sale to owner—3 Edw. 7, c. 37—Restriction on incumbrances - - 444
See Re-sale to Owner.
SANITARY AUTHORITY—Provisional Order—Compulsory purchase of water rights
See Compulsory Purchase. [494, 503
SEASHORE — *Foreshore — Patent — User — Weight of evidence.*] The House of Lords affirmed the judgments of Porter, M. R., and the Court of Appeal reported in [1905] 1 I. R. 483, 509, with costs. *Vandeleur* v. *Glynn and Attorney-General for Ireland* - - - - - H. L. 481
SETTLED LAND ACTS—*Compound settlement—Tenant for life—Power to jointure—Exercise of power by deed—Appointment of trustees for the purposes of the Settled Land Acts—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 20, *sub-s.* (2).] Where lands have been put in settlement by a will, with power to the tenant for life to charge the lands by way of jointure, and the power is exercised by the tenant for life by a deed,

SETTLED LAND ACTS—*continued.*
the will and deed do not together constitute a "compound" settlement. In such a case it is only necessary to appoint trustees, for the purposes of the Settled Land Act, of the will. *In re Hayes' Settled Estates* - - - Barton, J., 88

2. —— *Sale to tenants—Person "deemed to be tenant for life"—Bonus—Leave of Court—Principle to be adopted—Exercising discretion—Costs—Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Land Act*, 1904 (4 *Edw.* 7, *c.* 34), *s.* 3—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 63—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 7.] A person who, by virtue of section 63 of the Settled Land Act, 1882, is "deemed to be tenant for life" of settled land is not entitled, as a matter of course, to an order under section 7 (ii) of the Settled Land Act, 1884, giving the applicant leave to sell or proceed with a sale of the settled land. The Land Acts of 1903 and 1904 have not altered the law in Ireland in this respect. Under the circumstances, costs given to the applicants and trustees out of the proceeds of the sale of the settled land. The judgment of Barton, J., in *In re Iever* ([1904] 1 I. R. 492) adopted and applied. *In re Tuthill*; *In re Wynne* - - - - - - M.R. 305

—— Bonus—Assignment of life estate - 483
See Bonus. 2.

SETTLEMENT — After-acquired property — Agreement to settle—Bonus - 51
See Bonus. 1.

—— Annuity, whether perpetual or terminable 24
See Annuity. 1.

—— Compound—Settled Land Acts—Appointment of trustees - - - - - 88
See Settled Land Acts. 1.

—— Rentcharge—Option to purchase at a time unlimited - - - 194, 292
See Perpetuity.

SHOOTING—*Right of—Reservation—Grant of sporting rights—Profit* à prendre—*Landlord and tenant — Agreement not under seal.*] By agreement in writing, not under seal, dated 30th July, 1898, Lord *C.* agreed to let to the plaintiffs part of the lands of *B* and *C*, reserving, except as hereinafter provided, the exclusive right to game and the exclusive right of shooting upon the demised premises, for one year, from 1st May, 1898, and so on, from year to year, till the letting should be determined, at the yearly rent of £45; and further agreed that the plaintiffs should, for the term of ten years from the date of the agreement, have the right of shooting over all the lands of *B* and *C*, and full authority to use proper means for the preservation of the game on the said lands. The lands (of which Lord *C.* was owner in fee) consisted mainly of mountain in his occupation, and also of holdings in the occupation of yearly tenants. These tenants held under agreements in writing, not under

SHOOTING—*continued.*
seal, made in 1868, which gave them the right of grazing on the mountain, and reserved to the landlord the exclusive right to the game, and the exclusive right of shooting and sporting. Some of these tenant (together with the other persons living in the neighbourhood) interfered with the plaintiffs' shooting on the mountain. The plaintiffs brought an action for an injunction to restrain them from interfering with their right of shooting. It was contended on behalf of the defendants—(1) that the right of shooting over the tenants' holdings was not validly reserved to Lord *C.*, as the agreements were not under seal; (2) that the agreement made between Lord *C.* and the plaintiffs, not being under seal, was invalid as regards the sporting rights:—*Held*, (1) that the right of shooting was validly reserved; (2) that the grant of the right of shooting was not a mere license, but a demise of a profit *à prendre*, and that the agreement was valid. *Radcliff* v. *Hayes* - - M. R. 101

SOLICITOR—Defaulting administrator — Costs
See Administration. 1. [223, 225

STATUTES:
19 & 20 Geo. 3 (Ir.), c. 30—Tenantry - 258
See Renewable Lease.

3 & 4 Wm. 4, c. 37—Church Temporalities 5, 7
See Ecclesiastical Lease.

6 & 7 Wm. 4, c. 99—Church Temporalities 5, 7
See Ecclesiastical Lease.

7 & 8 Vict. c. 97—Charitable Donations, s. 16
See Charity. 1. [315

15 & 16 Vict. c. 31—Industrial and Provident Societies - - - - - - 98
See Winding up.

18 & 19 Vict. c. 63—Friendly Societies, 98
See Winding up.

23 & 24 Vict. c. 154—Landlord and Tenant, ss. 1–4 - - - - - - 101
See Shooting.

25 & 26 Vict. c. 89—Companies, s. 199 98
See Winding up.

34 Vict. c. 22—Lunacy, s. 95 (1) - - 480
See Limitations, Statute of. 3.

37 & 38 Vict. c. 57—Limitations, s. 8, 275, [282, 357
See Limitations, Statute of. 2. Part Payment.

38 & 39 Vict. c. 60—Friendly Societies, 98
See Winding up.

40 & 41 Vict. c. 56—County Courts and Officers, s. 33, sub-s. (d) - - - 82, 84
See County Court. 1.

—— —— ss. 33, 36 - - - - - 327
See County Court. 2.

41 & 42 Vict. c. 33—Dentists, - 252, 471
See Dentist. 1, 2.

STATUTES—*continued.*
41 & 42 Vict. c. 52—Public Health, ss. 38, 203 - - - - - - - 152
See PLANS.
—— —— ss. 202, 203, 286 - - 494, 503
See COMPULSORY PURCHASE.
45 & 46 Vict. c. 31—County Courts, s. 10, sub-s. (b) - - - - - 82, 84
See COUNTY COURT. 1.
45 & 46 Vict. c. 38—Settled Land, s. 20, sub-s. 2 - - - - - - - 88
See SETTLED LAND ACTS. 1.
—— —— s. 50 - - - - - - 483
See BONUS. 2.
—— —— s. 63 - - - - - - 305
See SETTLED LAND ACTS. 2.
47 & 48 Vict. c. 18—Settled Land, s. 7 305
See SETTLED LAND ACTS. 2.
50 & 51 Vict. c. 33—Land Law, s. 9 - 363
See TOWN-PARK. 2.
53 & 54 Vict. c. 62—Companies (Memorandum of Association), s. 1 - - - 237
See COMPANY.
53 & 54 Vict. c. 70—Housing of the Working Classes, Part III. - - - 152
See PLANS.
54 & 55 Vict. c. 66—Local Registration of Title, ss. 25, 35 - - - - 330, 334
See LOCAL REGISTRATION OF TITLE. 1.
—— —— s. 29 (4) - - - - - 447
See LOCAL REGISTRATION OF TITLE. 2.
55 & 56 Vict. c. 39—Industrial and Provident Societies - - - - - 98
See WINDING UP.
59 & 60 Vict. c. 47—Land Law, s. 6 - 363
See TOWN-PARK. 2.
—— —— s. 33 (4) - - - - 190, 311
See REDEMPTION.
63 & 64 Vict. c. cxii—Local Government Board (Ireland) Provisional Orders Confirmation (Housing of the Working Classes) No. 2 - - - - - 152
See PLANS.
3 Edw. 7, c. 37—Irish Land, s. 7 - 351, 354
See LAND LAW (IRELAND) ACTS. 2.
—— —— s. 23, sub-s. 12 - - - 361
See NEGOTIATION FEE.
—— —— s. 24, sub-s. 8 - - 116, 124
See LAND LAW (IRELAND) ACTS. 1.
—— —— s. 48 - - - - - 51
See BONUS. 1.
—— —— s. 48, sub-s. 1 - - 226, 483
See BONUS. 2, 4.
LAND LAW (IRELAND) ACTS. 1.
—— —— s. 48, sub-s. 4 1, 139, 148, 305
See BONUS. 3, 5.
SETTLED LAND ACTS. 2.
—— —— s. 54 - - - - - - 444
See RE-SALE TO OWNER.

STATUTES—*continued.*
3 Edw. 7, c. 37—Irish Land, s. 62, sub-ss. 1, 3
See EXCLUSIVE CHARGE. [21
—— —— s. 79 - - - - - - 361
See NEGOTIATION FEE.
4 Edw. 7, c. 34—Irish Land, s. 2, s. 3 (1) 51
See BONUS. 1.
—— —— s. 3 - - - - - - 305
See SETTLED LAND ACTS. 2.
SUB-DIVISION — Restriction on — 3 Edw. 7, c. 37, s. 54 - - - - - 444
See RE-SALE TO OWNER.
SUPERIOR INTEREST—Exclusive charge—3 Edw. 7, c. 37, s. 62 (1), (3) - 21
See EXCLUSIVE CHARGE.
—— Indemnifying lands — Priority of newly created rent—59 & 60 Vict. c. 47, s. 33 (4) - - - - - - - 190
See REDEMPTION.
—— Rentcharge—Option to purchase unlimited as to time - - - - 194, 292
See PERPETUITY.

SUPPLYING WORDS — *Will—Construction—Context.*] A testator left his property for life to *A.*, with a power of appointment in case of her death unmarried or without issue. There was no gift over in default of appointment; but the power of appointment was given "subject as hereinafter set forth," and in a later clause the testator provided "that in the event of my said daughter, under the circumstances before detailed, in case of non-marriage or no issue living at the time of her decease," all his property was to go to certain persons named:—*Held*, that it was clear that some word or words was or were omitted in the latter clause which provided for the event of the daughter doing, or not doing, something, but did not say what, and that the Court should supply the words "failing to exercise the said power of appointment," in order to effectuate the testator's intention which had been imperfectly expressed, but was to be gathered from the context and the whole will. *Munro* v. *Henderson*

[BARTON, J. 440; [Aff.]

SURETY — Receiver — Omission to re-register recognizance—Liability of estate 198
See RECEIVER.

TAXATION OF COSTS — *Action founded on salvage claim involving questions of contribution by numerous parties—Motion for judgment—Instructions for brief—Number of counsel—Fees—Registration as lis pendens—Gen. Ord. LXV., R. 65.*] In an action for contribution by the plaintiff, who had made a salvage payment of upwards of £2000 on foot of head-rent, under the circumstances reported [1904] 1 I. R. 341, it became necessary to investigate the title of thirty-nine different persons for a period of thirty years; the statement of claim, which, in the opinion of the Court, was not of

TAXATION OF COSTS—*continued.*
undue length, comprised twenty-three printed pages; and there were thirteen separate defences delivered. The plaintiff's solicitors sent instructions to junior counsel to settle reply, who, instead of doing so, advised moving for judgment on admissions in the pleadings delivered, and in default of defence as regarded the defendants who had not pleaded. This item included £5 5*s.* for instructions, £5 5*s.* fee to counsel, and £5 19*s.* 2*d.* for copies of documents. This was wholly disallowed on taxation, as was also a wide-line copy of the draft statement of claim for senior counsel to settle. A fee to senior counsel of £15 15*s.* to advise proofs was reduced to £6 6*s.*, and £225 for instructions for brief was reduced to £50. The costs of a second senior counsel on the motion for judgment, and instructions for brief on further consideration, were disallowed. The above disallowances were, as stated by the Taxing Master, mainly based on the case having been brought to a hearing on motion for judgment. The Taxing Master also disallowed the expense of a schedule prepared for use before the Chief Clerk at the inquiry, and reduced £52 14*s.*, for preparation of a notice, directed by the Chief Clerk for service on the defendants, to £13 13*s.*; reduced £21 paid to a surveyor by £6, and disallowed the registration of the action as a *lis pendens* on the ground that it was not registered until after the order on further consideration:—*Held*, by the Master of the Rolls, that the Taxing Master had underestimated the importance and difficulties of the case, particularly in its early stages, and that the circumstance that the labour and attention expended in the initiation of the proceedings, which enabled the case to be ultimately dealt with on a motion for judgment, ought not to be used as a reason for minimising the solicitors' remuneration. Accordingly, the Master of the Rolls referred all the above-mentioned items back to the Taxing Master for re-consideration:—*Held*, by the Court of Appeal, that the allowance of fees in excess of the scale showed that the Taxing Master had appreciated the magnitude of the case, and, except as to the fee to counsel to draft reply and the registration of the action as a *lis pendens* (both of which the Court of Appeal allowed), that there was no error in principle; and the remaining items objected to being within the discretion of the Taxing Master, the Court of Appeal (reversing the decision of the Master of the Rolls as to them) *held*, that the taxation should stand. *Allison* v. *Jenkins* M. R. 422; APP. 434

2. —— *Instructions for brief — Four counsel—Fees—Exercise of discretion — Attorney-General a co-defendant.*] Where, on review of taxation of costs between party and party, it appears that the Taxing Master has, in fact, exercised his discretion on proper grounds, the Court will not interfere unless it be shown that the amounts allowed by him under the various items in the bill of costs are unreasonable. £20 for instructions for statement of claim, £15 15*s.* for instructions for affidavit of documents, and £130 for instructions for brief, held not to be unreasonable, considering the nature of the action. The cost of a fourth counsel disallowed, the Taxing Master having allowed his mind to be influenced by the fact that costs could not be given against the Attorney-General. *Vandeleur* v. *Glynn and The Attorney-General* [M. R. 85; APP. 88

TENANT FOR LIFE AND REMAINDERMAN—Assignment of life estate—Bonus
See BONUS. 2. [483

—— Leave to tenant for life to sell - 305
See SETTLED LAND ACTS. 2.

—— Merger - - - - - - 159
See MERGER. 2.

—— Wasting property—Conversion—Will—Construction - - - - - - 32
See CONVERSION. 2.

TENANTRY ACT—Demand - - 258
See RENEWABLE LEASE.

TENANTS IN COMMON—Fiduciary relation—Graft - - - - - - 212
See GRAFT.

TERM—Settlement—Annuity - - - 24
See ANNUITY. 1.

TIME—Payment of legacy—Interest - 65
See INTEREST ON MONEY.

TITLE—Registration of.
See LOCAL REGISTRATION OF TITLE.

TITLE-DEEDS — Possession of — Legal and equitable mortgages - - - 57
See PRIORITY.

TRANSFER OF REGISTERED LAND—Registration of transferee as owner — Prior registration of judgment mortgage - - - - - 330, 334
See LOCAL REGISTRATION OF TITLE. 1.

TOWN-PARK — *Accommodation land—Unfiled agreement fixing fair rent—Land Acts*, 1881, 1887, 1896.] In 1884 an agreement and declaration fixing a fair rent of a holding was signed by the landlord and tenant, but was never filed in the Land Commission, although the rent fixed by the agreement was thenceforth accepted by the landlord. On the hearing of an appeal from an order of the Land Commission fixing a fair rent of the holding:—*Held* (*per* FitzGibbon and Holmes, L.JJ.; Sir Samuel Walker, C., *diss.*), that the agreement of 1884 did not operate as an estoppel against the landlord. so as to prevent him contending that the holding was a town-park; and that, although the fact of the agreement having been signed and acted upon was strong evidence against the landlord's contention, it was outweighed by the other

TOWN-PARK—*continued.*
evidence given by the landlord in favour of the holding being a town-park, and that the order fixing a fair rent should be discharged. *Moore, Tenant*; *M'Clintock, Landlord* - - - App. 180

2. —— *User of holding—Fair rent—Land Law (Ireland) Act*, 1887, *sect.* 9—*Land Law (Ireland) Act*, 1896, *sect.* 6.] Prior to 1887 a holding adjoining the town of *A.* fulfilled the conditions of a town-park. It had been let in 1800 for ninety-one years as an ordinary agricultural or pastoral farm. Its extent was 32A. 2R. statute measure, the reserved rent being £51 11*s.* 1*d.* above taxes, equivalent to £47 11*s.* 9*d.*, English. The lessee's interest was, in 1874, purchased for £250 by *V.*, who was a shopkeeper resident in *A.* There was evidence that from 1874 to 1898 the holding was used as an agricultural or pastoral farm, and the Court inferred that such had been the user from 1800. In 1898 and 1899 the grazing of the holding was let by auction, and this continued during the occupation of *V.*'s son (a land agent's clerk), the existing tenant up to the time of the present hearing. An originating notice to fix a fair rent was served in November, 1899:—*Held*, by Sir S. Walker, C., and Holmes, L.J., *diss.* FitzGibbon, L.J., that the tenant was entitled to have a fair rent fixed. *Per* FitzGibbon, L.J.: Section 9 of the Act of 1887, as amended by section 6 of the Act of 1896, requires proof of the user of the holding not only as agricultural or pastoral land, but also as an ordinary farm, and in this case the burden of proof lying on the tenant was not discharged by him. The date of service of the originating notice is the critical time for ascertaining the character of the user; but for this purpose the Court may have regard to the user proved or inferred during the whole period of the tenancy. The size of the holding in the present case *held* not necessarily to negative its being a town-park. In considering evidence of accommodation value, it is not necessary that every part of the holding should bear increased value as accommodation land. It is enough if the lands included in the letting fulfil as a whole this requisite. *Macnamara* v. *Macnamara* (32 L. R. Ir. 1) and *Daly* v. *Wright* (*ibid.* 9) discussed and adhered to. The clause in section 9 of the Act of 1887, as to interference with the improvement or development of the town to which the holding belongs, and the nature of evidence rebutting such suggested interference, considered. *Viscount Massereene and Ferrard, Landlord*; *Vance, Tenant* - 363

TRANSFER TO COUNTY COURT—40 & 41 Vict. c. 56, s. 33, sub-s. (*d*)—45 & 46 Vict. c. 31, s. 10, sub-s. (*b*) - 82, 84
See County Court. 1.

—— 40 & 41 Vict. c. 56, ss. 33, 36 - 327
See County Court. 2.

TRUST—*Or beneficial interest—Will—Construction.*] A testatrix bequeathed all her property to "her dearly beloved husband," whom she appointed sole executor, "to be applied" by him to the maintenance and education of her children:—*Held*, by the Court of Appeal, reversing the decision of the Master of the Rolls, that the testatrix's husband took all the property so bequeathed to him as a trustee for the children, and not beneficially. *In re Delahunty (Deceased)*; *O'Connor* v. *Butler* [M. R. 507; App. 510

—— Breach of - - - - - 275, 282
See Limitations, Statute of. 2.

—— Express—Annuity—Statute of Limitations
See Annuity. 2. [166, 176

—— Property subject to—Sale involving destruction of trust - - - - - 451
See Church Property.

——Support and education—Will—Perpetuity . 9
See Charity. 2.

—— Tenants in common — Fiduciary relation — New lease to one - - - 212
See Graft.

TRUSTEES—Power to act as—Bank—Memorandum of association—Alteration 237
See Company.

—— Settled Land Acts—Compound settlement 88
See Settled Land Acts. 1.

TURF—*Right of turbary—Paring the surface of peat-land—Scraw-turf—Deep bog-turf—"Mountain."*] A lease for lives renewable for ever, dated 1741, from the Corporation of *C.*, reserved to the tenants of all Corporation lands certain rights of grazing over the neighbouring mountain of *C.*, and the right to cut five slanes of turf on the mountain. The lease allowed the lessee to enclose the pasture lands for garden, corn, or meadowing, but not the lands subject to the right of turbary. The tenants having exhausted the deep bog-turf, of which there had been a considerable quantity on the mountain, claimed the right to pare "scraw"-turf off the surface of the mountain. The whole surface of the mountain was of a peaty character, and the top sod was everywhere capable of being pared off and used as fuel:—*Held*, by Barton, J., that, upon the true construction of the lease, turf meant bog-turf, not scraw-turf, and that the right of turbary extended to any portion of the bog on the mountain fitted for digging turf, but not to the general surface of the mountain, although the surface might be capable of being used as fuel. In several sub-leases of reclaimed arable land, and uncultivated mountain-land, rights of turbary had been given to sub-tenants over "the said mountain." This referred back to the demise of the "mountain" as "now and for some time past in the lessee's possession":—*Held*, that the word "mountain" in this context did not refer to the whole "mountain of *C.*," but

TURF—*continued.*
referred to the quality of the land, meaning the uncultivated mountain-land of which the sub-lessee had been in possession as distinguished from his reclaimed arable land. *Kildare* v. *Fisher* (1 Str. 71) applied. Decision of Barton, J., affirmed by the Court of Appeal. *Jameson* v. *Fahey* [BARTON, J., 411; APP. 421

UNREGISTERED COMPANY—Winding up —Jurisdiction - - - - - 98
See WINDING UP.

USE UPON USE—Rentcharge - 166, 176
See ANNUITY. 2.

USER—Patent—Weight of evidence - 481
See SEASHORE.

—— Town-park - - - - - 180, 363
See TOWN-PARK. 1, 2.

VENDOR AND PURCHASER — Infant owners attaining age and abandoning possession—Bailiff or guardian—Statute of Limitations - - - - - 393
See INFANT. 1.

WAIVER—Demand—Tenantry Act - 258
See RENEWABLE LEASE.

WASTING PROPERTY—Will—Construction —Conversion - - - - - 32
See CONVERSION. 2.

WATER RIGHTS—Compulsory purchase by Sanitary Authority - - 494, 503
See COMPULSORY PURCHASE.

WEIGHT OF EVIDENCE—Foreshore—User —Patent - - - - - - 481
See SEASHORE.

WILL—Charitable bequest—Educational purposes—Discretion—Uncertainty 9
See CHARITY. 2.

—— Class—Gift to—Perpetuity - - 9
See CHARITY. 2.

—— Codicil — Republication — Charitable devise
See CHARITY. 1. [315

—— Intention to merge charge - - 91, 159
See MERGER. 1, 2.

—— Legacy—Reversionary fund—Interest 65
See INTEREST ON MONEY.

—— Legacy—Whether for benefit of legatee or in trust - - - - 507, 510
See TRUST.

WILL—*continued.*

—— Limitation in tail—Personalty—Absolute or life interest - - - - - 73
See ESTATE FOR LIFE.

—— Proceeds of sale of land—Whether charge included in bequest of - - 159
See MERGER. 2.

—— Supplying words—Context - - 440
See SUPPLYING WORDS.

—— Wasting property—Conversion - 32
See CONVERSION. 2.

WINDING UP — *Companies Act*, 1862 — *Unregistered Company—Friendly Societies Acts* (18 & 19 *Vict. c.* 63; 38 & 39 *Vict. c.* 60)—*Industrial and Provident Societies Acts* (15 & 16 *Vict. c.* 31; 55 & 56 *Vict. c.* 39).] The Court has jurisdiction, under sect. 199 of the Companies Act, 1862, to wind up compulsorily, as an unregistered Company, a Society registered under the Friendly Societies Acts, but not registered under the Companies Act, 1862. The fact that such a Society has passed a resolution to dissolve, and is actually in process of dissolution, does not prevent a creditor of the Society from obtaining an order for winding up the Society. *In re Irish Mercantile Loan Society* - - - - - M. R. 98

—— Dental Company—Injunction suit—Costs
See DENTIST. 1. [252

WORDS—"Dentists"—Advertisements, &c.,
See DENTIST. 1, 2. [252, 471

—— "Estate"—3 Edw. 7, c. 37, s. 48 (1) 226
See BONUS. 4.

—— "Principal sum realized by the sale"—Bequest of proceeds of sale of land 159
See MERGER. 2.

—— "So incumbered that the vendor is not entitled to receive for his own use any part of the rents and profits"—3 Edw. 7, c. 37, s. 48 (1) - - - - 226
See BONUS. 4.

—— "So long as lessee, his executors, &c., shall pay yearly rent"—Agreement for lease
See LEASE. [488

WORDS OF LIMITATION—Lease - 488
See LEASE.

WORDS, SUPPLYING.
See SUPPLYING WORDS.

THE END.

BIBL.
LONDIN.
UNIV.